8. The Order of the Court of Appeals dated July 7, 1967.

9. Charges and Specifications of the New York City Police Department dated August 4, 1965.

10. Notice of Appeal to the Supreme Court of the United States.

III. The following question is presented by the Appeal:

"Is Article I., Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self incrimination suffers a penalty of loss of his position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?"

(Endorsement omitted)

* * * * * * *

(Served Aug. 1, 1967)

Order Noting Probable Jurisdiction

IN THE

SUPREME COURT OF THE UNITED STATES

No. 635—October Term, 1967

ROBERT VINCENT GARDNER,

Appellant,

—v.—

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

In this case probable jurisdiction is noted and the case is placed on the summary calendar.

January 29, 1968.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 635

ROBERT VINCENT GARDNER

Appellant,

v.

VINCENT L. BRODERICK as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

ROBERT VINCENT GARDNER,

Appellant,

v.

VINCENT L. BRODERICK as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of Fuld, Ch. J., of the Court of Appeals of the State of New York, dated July 7, 1967 is the only opinion by any Court below. It is reported in 20 N. Y. 2d 227; —— N. E. 2d ——. The unofficial citation is not assigned or available at time of printing of this statement. A copy of the opinion is annexed hereto in the appendix.

Jurisdiction

Petitioner-Appellant was dismissed from his position as Patrolman in the New York City Police Department after a hearing on charges of misconduct that he did not waive immunity before a grand jury. A petition (pursuant to Article 78, Civil Practice Law & Rules) to the Supreme Court of the State of New York seeking reinstatement with back pay was dismissed by order of the Appellate Division of the Supreme Court of the State of New York, First Department, dated February 9, 1967, unanimously and without opinion (fol. 66).* Judgment was entered against the Petitioner-Appellant on March 2, 1967 in Supreme Court of the State of New York, County of New York (fols. 57-58). An appeal therefrom was taken on constitutional grounds that the statutory provisions requiring public officers to waive immunity before a grand jury were repugnant to the United States Constitution Amendments I, V and XIV, by Notice of Appeal dated February 23, 1967. The Court of Appeals unanimously affirmed and remitted the case to the Supreme Court of the State of New York, County of New York by order dated July 7, 1967 (fols. 64-67), and rendered an opinion by Fuld, Ch. J. (fols. 60-63). A Notice of Appeal to this Court was served and filed on August 1, 1967 (fols. 69-70). The jurisdiction of this Court to review is conferred by 28 USC §1257(2) in that there was drawn in question below the validity of Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter on the ground that they were repugnant to the Constitution of the United States and the decision was in favor of their validity. That jurisdiction exists in the circumstances of this case is sustained by the following decisions: *Torcaso* v. *Watkins,* 367 U. S. 488; *Adamson* v. *Cal.,* 332 U. S. 46; *King Mfg. Co.* v. *Augusta,* 277 U. S.

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* References are to pages of the certified record unless otherwise noted.

100; *Jamison* v. *Texas,* 318 U. S. 413, 414; *Independent Warehouses* v. *Scheele,* 331 U. S. 70, 79; *Poulos* v. *New Hampshire,* 345 U. S. 395, 402.

Statutes Involved

The texts of all sections of statutes are set forth in full in the appendix.

New York State Constitution, Article I, §6, *Manuel For The Use of The Legislature of the State of New York,* 1966-1967, p. 16 (John P. Lomenzo, Secretary of State, Albany, N. Y.); *McKinney's Laws of New York Annotated,* Book 2 Part 1, Constitution pp. 12-13 of 1967 Pocket Supplement (Edward Thompson Company, Brooklyn, N. Y.).

New York City Charter §1123, *New York City Charter and Administrative Code Annotated,* Vol. 1 p. 30 (Williams Press, Inc., Albany, N. Y. 1963).

Laws, 1940, Ch. 834, *Laws of the State of New York, 1940,* Ch. 834, p. 2098 (J. B. Lyon Co. Printers, Albany, N. Y., 1940); *McKinney's Laws of New York Annotated,* Book 65 Part 1, Unconsolidated Laws, Ch. 9, §891, p. 32 (Edward Thompson Co. Brooklyn, N. Y. 1949).

Civil Service Law §75(2), *Laws of the State of New York, 1960,* Ch. 312, p. 1165; *McKinney's Laws of New York Annotated,* Book 9, Civil Service Law, pp. 45-46 1967 Pocket Supplement (Edward Thompson Co. Brooklyn, N. Y.).

Question Presented

Is Article I, Section 6 of the New York State Constitution and is Section 1123 of the New York City Charter repugnant to the United States Constitution in that any

public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?

Statement

The Appellant was dismissed from his position of Patrolman in the New York City Police Department after a hearing on a charge of misconduct, said charge being that he did refuse to waive immunity before the New York Grand Jury. Appellant contends that such refusal is not an act of misconduct in that the provisions of law contained in the New York State Constitution and New York City Charter, requiring such waiver are unconstitutional. He seeks reinstatement with back pay on the grounds that he was never convicted by the department of any justicible act of misconduct as a prerequisite to dismissal and that by virtue of the dismissal he has been denied equal protection of the Laws and denied property without due process of law. A petition pursuant to Article 78, Civil Practice Law and Rules (CPLR) was brought in New York Supreme Court, County of New York. In the petition, paragraph "Sixth" (fol. 4) it was alleged that the appellant was deprived of equal protection of the laws and deprived of property without due process of law by virtue of his dismissal. After the Answer & Return was served, which document set forth the basis of the determination pursuant to which the petitioner was dismissed, to wit: refusal to waive immunity, as required by the New York State Constitution and New York City Charter (fols. 8, 9, 52), the appellant did serve his Reply thereto. In it he did allege in Paragraph "Second" that

the sections of law requiring the signing of a waiver of immunity were unconstitutional (fol. 56). The federal question was thereby raised by the pleadings. Moreover, the appeal to the Court of Appeals from the decision of the Appellate Division of the Supreme Court, First Department dismissing the petition, was on grounds that the sections of law requiring the waiver of immunity by public officers were repugnant to the United States Constitution, Amendments I, V and XIV (fol. 59). The resultant opinion of the Court of Appeals affirming the dismissal of the petition cited in the opinion that the appellant claimed "that he was dismissed solely for refusing to waive his privilege against self-incrimination and that it was unconstitutional for the Police Commissioner to discharge him on that ground" (fol. 60). The allegations of the pleadings, the questions presented on appeal to the Court of Appeals of the State of New York, and the recitation of the facts in the opinion of that Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. 28 U. S. C. 1257(2).

The Question Is Substantial

The federal question is substantial. The opinion of the Court of Appeals in this very case states, "Such provisions have been upheld in the past (citing case) and, *although the Supreme Court has indicated that the question may still be an open one* (see *Spevack* v. *Klein,* 385 U. S. 511, 516, n. 3; *Stevens* v. *Marks,* 383 U. S. 234, 243), we find no constitutional defect in the statute as it applies to this petitioner" (fol. 61). (Emphasis supplied.) Moreover, the question set forth in the notice of appeal to this court (fols. 69-70) is verbatim with the one upon

which certiorari was granted in *Stevens* v. *Marks,* 383 U. S. 234, in which case, this court stated, "Even were we to assume, without deciding, that a state may constitutionally exact on pain of loss of employment and in the absence of counsel, the waiver of a constitutional right, we would be unable to find any justification for denying the right to withdraw it." The protection of the Fifth Amendment applies through the Fourteenth Amendment to the States, *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The opinion of the Court below states that the testimony obtained from a public officer who signs a waiver of immunity upon pain of loss of employment may not be used against that public officer in a criminal proceeding, citing *Garrity* v. *New Jersey,* 385 U. S. 493 (1967). The Court, however states that the said testimony can be used in the administrative disciplinary hearing (fols. 61-62). The decision does not recognize that it is the testimony and the method of its attainment which has been characterized as compelled by *Garrity* v. *New Jersey.* Moreover since the state privilege and federal privilege have been merged by virtue of the doctrine of *Malloy* v. *Hogan,* the results of the benefit of the imposition of such privilege should be the same. Thus, in *Schlochower* v. *Board of Education,* 350 U. S. 551, the act of refusal to testify before a congressional committee was not an act of misconduct justifying dismissal by the state because the act was merely an exercise of a federally protected right. Since the right is now both federal and state in coverage, the act of this Appellant was no more an act of misconduct than that of Schlochower. See, also: *Steinberg* v. *United States,* 141 Ct. Cl. 1, 163 F. Supp. 590, cited with approval in *Sherbert* v. *Verner,* 374 U. S. 398, 404, n. 6. The opinion of the Court of Appeals also deprives the Appellant of equal protection of the laws, in that the New York State Legis-

lature has specifically stated that a police officer can only be dismissed after a hearing on stated charges with a right to counsel and with the burden of proving the misconduct to be on the party alleging same. *Laws, 1940,* Ch. 834. By compelling the Appellant who was then under departmental charges encompassing the same area of the grand jury inquiry (fols. 68, 60, 19, 27, 32, 44-45) to testify, and then by allowing said testimony to be used against him in the departmental hearing, as suggested by the opinion, the burden of proof of misconduct would be shifted to the Appellant, while all other officers of his class enjoyed the legislative protection of requiring the department to prove the acts of misconduct. The Legislature has required the party alleging misconduct to prove it in the cited statute and also generally by *Civil Service Law* §75(2). The Court of Appeals has in effect repealed these sections by the opinion. Moreover, a Civil Service Employee need not testify at his own removal hearing. *Schawecker* v. *Green,* 96 App. Div. 249, 254 (1st Dep't 1904). The opinion would seem to overrule this long standing doctrine, and shift the burden of proving misconduct upon the accused and from the party alleging it. This runs contrary to basic precepts of due process of law. The federal question is substantial. It is the question of loss of employment by a public officer unless he waives a constitutionally protected right, which will lead to testimony already characterized by this Court as compelled, which testimony can be used against him. The question is of such substantial importance that it requires plenary consideration with briefs on the merits and oral argument for its resolution. Is the refusal to waive a constitutional privilege under threat of loss of employment an act of misconduct justifying dismissal of a public officer? Every public officer is privy to the resolution of

this question. The question is not confined to New York State public officers, since many other states have similar laws requiring the waiver of immunity upon pain of loss of office. See e.g.: *N. J. Rev. Stat.* §2A:81-17 (Supp. 1965); *Cal. Government Code* §1028.1; *La. Const.* Art. XIV §15 (P) (1).

CONCLUSION

It is respectfully submitted that the court should note probable jurisdiction of this appeal.

Dated: New York, N. Y.,
September 13, 1967.

RICHARD GUGLIOTTA,
Attorney for Appellant

APPENDIX

Opinion of Fuld, Ch. J.

New York Court of Appeals, July 7, 1967, reported in 20 N. Y. 2d 227, being the only opinion in this case (fols. 60-63).

FULD, Ch. J.

In this article 78 proceeding, the petitioner seeks reinstatement as a patrolman in the New York City Police Department, claiming that he was dismissed solely for refusing to waive his privilege against self-incrimination and that it was unconstitutional for the Police Commissioner to discharge him on that ground. In August of 1965, a New York County Grand Jury was investigating accusations of bribery and corruption of police officers in connection with illicit gambling operations. The petitioner, then under departmental charges, was subpoenaed to appear before the grand jury. After being advised of the investigation and that the grand jury desired to question him concerning the performance of his official duties, he was requested to sign a limited waiver of immunity—"to waive immunity from prosecution" for any misconduct in office disclosed by his testimony—as provided in section 1123 of the New York City Charter. (See, also, N. Y. Const., art. I, §6.)[1] The petitioner was also

[1] Section 1123 of the City Charter provides, in part, that, if any employee of the City "shall * * * wilfully refuse or fail to appear before * * * any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding * * * official conduct of any officer or employee of the city or of any * * * county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant."

(footnote continued on next page)

informed that, under both the Charter and the Constitution, he was required to sign the waiver and that, if he refused to do so, he would be discharged from his position as a police officer. He refused to execute the waiver and, following an administrative hearing, was dismissed from the force.

It is clear, and was so understood by the petitioner, that section 1123 of the Charter required him, as a condition of his continued employment by the police department, to waive his constitutional privilege against self-incrimination and to answer questions regarding the conduct of his office and the performance of his official duties. Such provisions have been upheld in the past (see, e.g., *Nelson* v. *Los Angeles County*, 362 U. S. 1) and, although the Supreme Court has indicated that the question may still be an open one (see *Spevack* v. *Klein*, 385 U. S. 511, 516, n. 3; *Stevens* v. *Marks*, 383 U. S. 234, 243), we find no constitutional defect in the statute as it applies to this petitioner.

In *Garrity* v. *New Jersey* (385 U. S. 493), the Supreme Court, deciding that the government may not use "the threat of discharge to secure incriminating evidence" against a public employee, held that a police officer could not be compelled to waive his constitutional privilege against self-incrimination by threats that he would other-

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(footnote continued from previous page)

And section 6 of article I of the State Constitution declares, insofar as relevant, that "No person shall * * * be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his * * * office * * * or the performance of his official duties * * *, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, * * * be removed from his * * * office by the appropriate authority."

wise be removed from office. The testimony obtained under such circumstances was ruled to be inadmissible in subsequent criminal proceedings brought against him. This decision undoubtedly had the effect of partially invalidating section 1123 of the New York City Charter as well as section 6 of article I of the New York Constitution. But nothing decided in the *Garrity* case bears on the issue in the present case. If the petitioner before us had executed the waiver required by section 1123 and then testified about misconduct in office, his testimony, though inadmissible in a criminal prosecution, would, nevertheless, have furnished sufficient cause to justify his dismissal from the police force. (Cf. *Ullman* v. *United States*, 350 U. S. 422, 430-431.)

In point of fact, the petitioner did not execute the waiver and stood on his constitutional privilege against self-incrimination when notified that he was to be questioned about malfeasance as a police officer. Such information patently bore upon his fitness to remain in office, information which the public had a right to know and the petitioner was under a duty to reveal. His refusal to speak on the subject constituted "employee insubordination for failure to give information which * * * the State has a legitimate interest in securing" (*Nelson* v. *Los Angeles County*, 362 U. S. 1, 7, *supra*; see *Spevack* v. *Klein*, 385 U. S. 511, 519, *supra* [*per* Fortas, J., concurring]), and, consequently, he was properly dismissed from the police force. (See *Canteline* v. *McClellan*, 282 N. Y. 166; *Christal* v. *Police Com. of San Francisco*, 33 Cal. App. 2d 564; *Cunningham* v. *Civil Service Com'n*, 48 Hawaii 278; *Fallon* v. *New Orleans Police Department*, 238 La. 531; *Souder* v. *Philadelphia*, 305 Pa. 1.) Although people in public office and on the public payroll may not be compelled to surrender their constitutional privilege against self-incrimination (see *Garrity* v. *New Jersey*, 385 U. S. 493,

supra), they have no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties.

In *Spevack* v. *Klein* (385 U. S. 511, *supra*), the Supreme Court held that an attorney could not be compelled, upon pain of disbarment, to waive his privilege against self-incrimination and testify about his professional conduct. (See, also, *Matter of Cohen,* 7 N Y 2d 488, 498 [dissenting opinion].) However, a lawyer, though licensed by the State—like a doctor, barber or chauffeur—is not, as Mr. Justice Fortas pointed out in his concurring opinion in the *Spevack case* (385 U. S., at p. 520), "an employee of the State. He does not have the responsibility of an employee to account to the State for his actions." The petitioner, however, did have such a responsibility and his refusal to carry out that responsibility rendered him subject to removal from his position of public trust and confidence.

The order appealed from should be affirmed, without costs.

* * *

Order affirmed, without costs. Opinion by Fuld, Ch. J. All concur.

New York State Constitution, Article I, §6

New York State Constitution, Article I, §6, reads,

[Grand jury; protection of certain enumerated rights; duty of public officers to sign waiver of immunity and give testimony; penalty for refusal.] §6. No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the con-

sent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 8, 1949; November 3, 1959.)

New York City Charter, §1123

New York City Charter, §1123 reads,

§1123. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (Derived from former §903.)

Laws, 1940, Ch. 834

Laws, 1940, Ch. 834 reads:

Section 1. Removal of policemen serving in the competitive class of civil service in the several cities, counties, towns and villages of the state. A policeman serving in the competitive class of civil service in any city, county, town or village of the state, any provision of law, rule or regulation to the contrary notwithstanding, shall not be removed from his position except for incompetency or misconduct shown after a hearing upon due notice upon

stated charges, and with the right to such policeman to be represented by counsel at such hearing and to a judicial review in accordance with the provisions of article seventy-eight of the civil practice act. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Hearings upon charges pursuant to this act shall be held by the officer or body having the power to remove the person charged with incompetency or misconduct or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body, and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision.

§2. This act shall take effect immediately.

Civil Service Law §75(2)

Civil Service Law §75(2) reads:

Section 1. Subdivision two of section seventy-five of the civil service law, as added by chapter seven hundred ninety of the laws of nineteen hundred fifty-eight, is hereby amended to read as follows:

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy

or other [employee of] *person designated by* such officer or body [designated] in writing for that purpose. In case a deputy or other [employee] *person* is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

§2. This act shall take effect immediately.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

SUPREME COURT, U. S.
(38942)

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IN THE

Supreme Court of the United States

October Term, 1967

No. 635

ROBERT VINCENT GARDNER,
Appellant,

v.

VINCENT L. BRODERICK, as Police Commissioner of the City of New York and THE CITY OF NEW YORK,
Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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The dismissal of a policeman does not violate his rights under the United States Constitution when the dismissal is pursuant to Article I, Section 6, of the New York Constitution and Section 1123 of the New York City Charter, which require a public employee to be discharged if he refuses to sign a waiver of immunity and to answer relevant questions before a grand jury concerning his conduct and performance of official duties and which have been interpreted to require a hearing before such discharge at which the public employee is afforded an opportunity to explain his refusal to waive immunity or to answer such questions	7
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IN THE

Supreme Court of the United States

October Term, 1967

No. 635

ROBERT VINCENT GARDNER,

Appellant,

v.

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case, pursuant to a request of this Court transmitted by its Clerk, moves to dismiss or affirm the appeal on the ground that the questions presented are so insubstantial as not to need further argument.

Question Presented

Where a police officer, after being called before a grand jury and refusing to sign a waiver of immunity with respect to testimony concerning the conduct of his office and the performance of his official duties, is granted a hearing at which he fails to offer any explanation of such refusal and is thereafter dismissed from his position pursuant to Article I, Section 6, of the New York Constitution and Section 1123 of the New York City Charter, does such dismissal violate his rights under the United States Constitution?

Facts

A. Charge Against Appellant

The charge against the appellant was, as follows (RA 1):*

> "The District Attorney of New York County has advised the Police Commissioner that you were called and appeared before the Grand Jury of New York County on the 6th day of August, 1965, and that you refused to waive immunity from prosecution as provided in Section 1123 of the New York City Charter and Article I, Section 6 of the Constitution of the State of New York.
>
> "You are, therefore, directed to appear before a Trial Commissioner in the Board Room on the second floor of Police Headquarters, 240 Centre Street, New York, New York, on the 10th day of August, 1965, at 2:30 P.M., to show cause why your employment as a

* All references are to pages of the Respondents' Appendix in the New York Court of Appeals unless otherwise indicated.

member of the Police Department should not be terminated and your office vacated as prescribed by the aforesaid provisions of law."

B. Departmental Hearing

The charges against the appellant were tried before Leonard E. Reisman, Hearing Officer, on August 10, 1965. The appellant was present and was represented by counsel (RA 2).

At the hearing, the Police Department introduced in evidence a letter from Mr. Andreoli, Assistant District Attorney, New York County, advising the Police Commissioner that appellant had refused to sign a limited waiver of immunity (RA 3, 5). A copy of the notice of the charge was offered in evidence and was objected to by the appellant, who also moved to have two other charges then pending against him included in this limited hearing. The Hearing Officer overruled the objection, denied the motion and admitted the letter from the District Attorney's Office and the notice of the charge in evidence (RA 3-5).

Assistant District Attorney Andreoli's Testimony

Mr. Peter D. Andreoli testified that the appellant was called before the Second August 1965 Grand Jury in New York County on August 5, 1965, and was tendered a limited waiver of immunity but was not placed under oath (RA 6). He further testified that the appellant was advised that the Grand Jury "wished to question him concerning the conduct of his office in the performance of his duties" and, at appellant's request, there was an adjournment to enable him to discuss the limited waiver with his attorney (RA 7).

On August 6, 1965, appellant reappeared and was advised of his rights and the nature of the investigation, which was to determine whether the crimes of conspiracy to bribe public officers had been committed, specifically concerning bribes by gamblers to police officers to aid in the continuance of unlawful gambling (RA 7-8).

The appellant then refused to sign a waiver of immunity because "his attorney told him he was a target of an investigation" (RA 7, 8, 20).

The Department next offered the unsworn statements of appellant before the Second August 1965 Grand Jury and a copy of the limited waiver of immunity, which were admitted in evidence over objection (RA 7, 8, 12-23).

On cross-examination, Mr. Andreoli testified that appellant appeared before the Grand Jury pursuant to a subpoena and that he was a potential defendant of the investigation (RA 9). He further testified that, had the appellant signed the limited waiver of immunity, he would have been questioned at that time.

The Court order releasing the Grand Jury minutes was then admitted in evidence (RA 10).

Appellant's Grand Jury Testimony

The grand jury minutes before the Second August 1965 Grand Jury, which were admitted in evidence (RA 7-8), disclosed that appellant appeared as a witness and was not sworn. He was advised of the nature of the Grand Jury investigation, which he stated he understood and had been aware of since June of 1964 (RA 13). After his constitu-

tional rights and his duty to testify under the Constitution of the State of New York and the New York City Charter if he wished to retain his public office had been explained, appellant stated that he was represented by counsel who was not present at the time and that he, therefore, requested an adjournment to show the limited waiver of immunity to his attorney. This request was granted (RA 14-16).

On August 6, 1965, appellant was recalled as a witness, but was not sworn. He was again informed of the nature of the Grand Jury investigation (RA 19). He stated that he had discussed his constitutional rights and his duty to testify with his attorney and stated, "On the advise of my attorney I have been regarded as a target of this investigation, and you have no authority to question me.". He was then advised that he had been called before the Grand Jury as a public officer to testify concerning the performance of his duties as a police officer (RA 20). Appellant then refused to sign the waiver of immunity (RA 21).

Motion to Dismiss

Decision on the motion to dismiss the charge because the appellant had been subpoenaed and was a target of the investigation was reserved (RA 11).

Appellant's Case

Appellant did not offer any evidence on his behalf or offer any explanation of his refusal to sign a waiver of immunity (RA 11).

C. Commissioner's Determination

In the report of Hearing Officer Reisman, dated August 11, 1965, he found that appellant had been called before the Grand Jury and had refused to sign a waiver of immunity as required by Section 1123 of the New York City Charter. He recommended that appellant's employment be terminated and his office vacated (RA 24).

Based on these findings and recommendations, Police Commissioner Broderick ordered appellant's office vacated (RA 25).

ARGUMENT

The dismissal of a policeman does not violate his rights under the United States Constitution when the dismissal is pursuant to Article I, Section 6, of the New York Constitution and Section 1123 of the New York City Charter, which require a public employee to be discharged if he refuses to sign a waiver of immunity and to answer relevant questions before a grand jury concerning his conduct and performance of official duties and which have been interpreted to require a hearing before such discharge at which the public employee is afforded an opportunity to explain his refusal to waive immunity or to answer such questions.

(1)

The appellant argues that to dismiss him for refusing to waive immunity and testify before a grand jury constitutes a violation of his rights under the Fifth Amendment. He relies primarily on the cases of *Slochower* v. *Board of Education,* 350 U. S. 551 (1956) and *Garrity* v. *New Jersey,* 385 U. S. 493 (1967).

Slochower involved the dismissal of a teacher at a public college pursuant to Section 903 of the New York City Charter because he had refused, before a Congressional committee, to answer questions concerning membership in the Communist Party. The opinions of this Court first made it clear that a sinister meaning could not be imputed merely because a person exercised his right under the Fifth Amendment to refuse to testify. The opinion then said that Section 903, as interpreted and applied, operated to discharge every employee who invoked the Fifth Amend-

ment (p. 558). It went on to say that the questions asked were being taken as confessed and that no consideration was being given to such factors as the subject matter of the questions or justification for the exercise of the privilege.

It then said (p. 558):

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or * * * official conduct of city employees.'"

The case, therefore, appears to have been decided on two grounds. One related to the nature of the inquiry at which the refusal to testify occurred. The other emphasized the automatic discharge for exercising the Fifth Amendment right before an agency other than the employer—the absence of an opportunity for the employee to explain his exercise of the privilege or for the employer to consider the circumstances of the refusal to answer.

Other decisions of this Court hold that a public employee who fails to answer questions relating to his employment may be dismissed pursuant to a relevant statute if he has had an opportunity to explain his refusal at a hearing before an appropriate body. *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960).

New York City Charter, Section 903, involved in the *Slochower* case, and its successor section, Section 1123 of the City's new charter, are identical. Both, if read literally, require an automatic dismissal of an employee for refusal to testify at specified hearings or inquiries. Nevertheless, after the *Slochower* decision, the New York courts treated the section and Article I, §6, of the New York Constitution as requiring a hearing before dismissal. *Matter of Conlon* v. *Murphy*, 24 A D 2d 737, 263 N.Y.S. 2d 360 (1965). The same rule was applied in the two cases decided under the title of *Matter of Gardner* v. *Murphy*, 46 Misc 2d 728, 260 N.Y.S. 2d 739 (1965). As a result the appellant herein was given a hearing and, thereafter, dismissed. The companion case was reversed because of its peculiar circumstances. *Matter of Koutnik* v. *Murphy*, 25 A D 2d 197, 268 N.Y.S. 2d 265 (1966), app. to New York Court of Appeals pending.

In *Garrity* it was held that answers given by police officers to questions asked them in the course of an Attorney General's investigation could not be used against them in a criminal prosecution. The answers were excluded on the ground that they were coerced confessions because the police officers were faced by a choice of either answering the questions or forfeiting their jobs by reason of a New Jersey forfeiture of office statute similar to the New York Constitution and City Charter provisions here involved. This Court did not pass on the validity of the forfeiture of office statute. It confined itself to holding that answers given under threat of its application are coerced and, therefore, cannot be used in a criminal prosecution of the police officers.

In the companion case of *Spevack* v. *Klein*, 385 U. S. 511 (1967), this Court held that a lawyer cannot be disbarred because he invoked the Fifth Amendment as the ground for refusing to honor a subpoena to produce financial records and for refusing to answer questions relevant to charges of misconduct in carrying on his law practice. It said that the threat of disbarment was a powerful form of compulsion to make a lawyer relinquish the Fifth Amendment privilege.

Mr. Justice DOUGLAS, who spoke for the majority in both the *Garrity* and *Spevack* cases, wrote the following footnote in the *Spevack* opinion (385 U. S. at p. 516):

> "3. Whether a policeman, who invoked the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach."

Mr. Justice FORTAS, in his concurring opinion in that case, said (385 U. S. at p. 519):

> "But I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."

The quoted reservations apparently apply to an automatic discharge of a police officer for refusing to testify.

Here the dismissal was not automatic. At the hearing granted appellant subsequent to his refusal to waive immunity, he failed to offer any explanation for such refusal.

Steinberg v. *United States*, 141 Ct. Cl. 1, 163 F. Supp. 590 (1958), relied on by appellant, held that a statute which *automatically* revoked a federal pension as of the date that the pensioner refused to testify before a grand jury, federal court or congressional committee was invalid. The Court relied on the *Slochower* case.

It should be recalled that the Grand Jury investigation was concerned with a conspiracy to bribe police officers to permit illegal gambling operations, that the appellant was advised of the nature of the investigation and that he was requested to sign a limited waiver of immunity (RA 12, RA 19). The waiver was limited to matters "concerning the conduct of my office on the performance of my official duties" (RA 22).

Appellant, as a police officer, had a duty to furnish the appropriate authorities with information pertinent to his employment. This is especially significant where the conduct in question relates to the administration of justice and the integrity of the Police Department. His refusal to sign a limited waiver of immunity in this investigation concerning the bribery of police officers and his failure, at his hearing, to give reasons for his refusal are inconsistent with his duty as a police officer. Having breached his duty, appellant was properly dismissed.

Particularly apt is the following statement in *Scholl* v. *Bell*, 125 Ky. 750, 102 S.W. 248, 261-262 (1907):

"Here were police officers being interrogated as to existence of crimes they were paid to prevent, if possible; if not, to expose and punish afterwards; and yet they one and all refused to answer 'under advice of counsel.' Suppose a secret murder had been committed, and the police officer on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him?"

(2)

The appellant also argues that he has been denied equal protection of the laws (Juris. Statement, pp. 6-7). The petition in the New York Supreme Court instituting this proceeding alleges in general terms that there has been a denial of equal protection of the laws (Par. "Sixth"). The issue, however, was not presented to the New York Appellate Division or to the Court of Appeals. And there is not the slightest indication that the New York courts ever considered the issue. It would appear, therefore, that it cannot be raised on this appeal. *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. 341, 343-344 (1920); *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 433-434 (1940); *Wilson* v. *Cook*, 327 U. S. 474, 483-484 (1946). Moreover, the reference in the petition to equal protection of the laws does not specifically refer to the United States Constitution despite the fact that there also is an equal protection clause in Article I, §11, of the New York Constitution. *Kansas Endowment Asso.* v. *Kansas*, 120 U. S. 103, 104 (1887).

In any event, the appellant's equal protection argument lacks merit. It appears to assume that we are dealing with

a case where the police officer has testified before a grand jury and that such testimony is being used as the basis for a dismissal, which is not what occurred in the present case. At the least, it assumes that the New York Court of Appeals has held that the burden of proof of misconduct, which ordinarily is on the party seeking to have a police officer dismissed, is on the appellant in the present case.

All that has been held, however, is that a police officer who has refused to furnish information to a grand jury regarding the conduct of his office and the performance of his official duties may be discharged unless he offers an appropriate explanation for such refusal. This applies to all police officers. Even if it varies from the rule applicable under other circumstances, it is reasonable; and it is not discriminatory because of its uniform application to all police officers pursuant to the New York Constitution and the New York City Charter, as interpreted since the *Slochower* decision.

CONCLUSION

The appeal to this Court from the judgment of the New York Court of Appeals should be dismissed, or the judgment affirmed.

January 8, 1968.

Respectfully submitted,

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SUPREME COURT, U. S.

Office-Supreme Court, U. S.
FILED
JAN 13 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 635

ROBERT VINCENT GARDNER,
Appellant,

v.

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,
Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appellees' contention in the motion papers that the appellant did not offer any explanation for his refusal to sign the waiver of immunity is not correct in that his reasons therefor were before the hearing officer; appellant did urge denial of equal protection of the laws in the state court.

Appellant submits this brief in opposition to the motion to dismiss or affirm to point out to this Court that the contention of the appellees on pp. 5 and 11 of the motion which

states that the appellant failed to give reasons for his refusal to sign the waiver of immunity is incorrect. The Grand Jury minutes were in evidence at the hearing, and the contents thereof were before the Hearing Officer. When asked to sign the waiver of immunity, the appellant stated at the Grand Jury hearing, "A. Until now? On the advice of my attorney I have been regarded as a target of this investigation and you have no authority to question me" (pp. 33-34).* At the departmental hearing Assistant District Attorney Andreoli repeated in substance this reason (p. 45) and the minutes were offered into evidence. Appellant's counsel at the hearing, in moving to dismiss the charge, reasserted the good and compelling reason for the refusal to sign the waiver—that appellant was at the time of the subpoena a target of the investigation and that his presence in the Grand Jury room was illegal and all consequences flowing therefrom were illegal (pp. 49-50). This reason is based on the fact that the appellant at the time of his appearances before the Grand Jury was suspended and under departmental charges (pp. 68, 37) which charges encompassed the same announced area of inquiry of the Grand Jury investigation (pp. 68, 19, 32, 44-45); that he was a potential defendant (p. 47); that it was not the intention of the Grand Jury to offer immunity (p. 16); and that at the time of his Grand Jury appearance appellant was "* * * fighting for my job in the Police Department at the trial room" (p. 28). From these facts appellant concluded that he was not a witness in truth and fact at the Grand Jury hearing, but was a target of the investigation. Counsel at the hearing moved to dismiss the charge on the ground that the power of the Grand Jury to subpoena was limited to witnesses who are in truth and fact witnesses, and not

* All page references are to the Certified Record unless otherwise indicated.

to targets of the investigation, citing *People* v. *Steuding*, 6 NY2d 214 (pp. 49-50). This contention was urged throughout the state court proceedings. The *Steuding* case and *Matter of Bernoff* v. *Amoroso*, 188 Misc. 845, aff'd 271 AD 925, were cited and urged by appellant in the state court proceedings. Confirmation of this can be found in the official report of this case—*Matter of Gardner* v. *Broderick*, 20 NY2d 227, under "Points of Counsel" wherein those cases are cited along with *Schawecker* v. *Green*, 96 App. Div. 249, 254 (1st Dep't 1904). *Schawecker* v. *Green* holds that a Civil Service employee under charges need not testify at his own removal hearing since his superior officer has changed roles to that of his judge. Appropriate are the words of *Matter of Bernoff* v. *Amoroso*, at 188 Misc. 845, 847,

> "* * * Attendance of persons before a grand jury is governed exclusively by §609 of the Code of Criminal Procedure which authorizes the District Attorney to issue subpoenas for 'witnesses' to 'appear before the grand jury, upon an investigation pending before them.' This is the only provision of law which empowers the district attorney to compel the appearance of a person before the grand jury. * * * Section 609 specifically limits persons for whom subpoenas may be issued to 'witnesses'. The generic term 'persons' is not used. This is clear recognition of the distinction which exists between persons who are the objects of grand jury inquiry and 'witnesses'. Accordingly the grant of power to subpoena persons to appear before a grand jury is limited to 'witnesses.' * * *"

The requirement of signing a waiver of immunity is unconstitutional under the circumstances involving threatened forfeiture of position and hence falls of its own weight as

a requirement of public office. In addition thereto, appellant offered compelling and cogent reasons for the inappropriateness of signing the waiver of immunity which caused a shift of burden of proving misconduct and permitted consequences to flow from illegal Grand Jury procedures which were a deprivation of equal protection of the laws. These reasons were urged in the state courts.

Conclusion

The motion to dismiss or affirm should be denied and jurisdiction noted.

January 12, 1968

Respectfully submitted,

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SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

Opinion Below

The only opinion by any Court below is that of the New York Court of Appeals reported in 20 N. Y. 2d 227, 229 N. E. 2d 184.

Jurisdiction

Jurisdiction of this Court is invoked by 28 U. S. C. §1257(2) in that there was drawn in question below the validity of Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Char-

ter on the ground that they were repugnant to the United States Constitution and the decision was in favor of their validity. The decision below was on July 7, 1967; notice of appeal to this Court was served on August 1, 1967; the jurisdictional statement was filed in this Court on September 19, 1967; probable jurisdiction was noted on January 29, 1968 and the case was placed on the summary calendar.

Statutes Involved

The texts of all sections of statutes are set forth in full in the appendix to this brief.

New York State Constitution, Article I, §6, *Manuel For The Use of The Legislature of the State of New York,* 1966-1967, p. 16 (John P. Lomenzo, Secretary of State, Albany, N. Y.); *McKinney's Laws of New York Annotated,* Book 2 Part 1, Constitution pp. 12-13 of 1967 Pocket Supplement (Edward Thompson Company, Brooklyn, N. Y.).

New York City Charter §1123, *New York City Charter and Administrative Code Annotated,* Vol. 1 p. 30 (Williams Press, Inc., Albany, N. Y. 1963).

Laws, 1940, Ch. 834, *Laws of the State of New York, 1940,* Ch. 834, p. 2098 (J. B. Lyon Co. Printers, Albany, N. Y., 1940); *McKinney's Laws of New York Annotated,* Book 65 Part 1, Unconsolidated Laws, Ch. 9, §891, p. 32 (Edward Thompson Co. Brooklyn, N. Y. 1949).

Civil Service Law §75(2), *Laws of the State of New York, 1960,* Ch. 312, p. 1165; *McKinney's Laws of New York Annotated,* Book 9, Civil Service Law, pp. 45-46 1967 Pocket Supplement (Edward Thompson Co. Brooklyn, N. Y.).

Questions Presented for Review

"Is Article I Section 6 of the New York State Constitution and is Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?

"Is a suspended police officer under departmental charges who is subpoenaed before a grand jury inquiring into the substance encompassed in those departmental charges legally before said grand jury? Is his refusal to sign a waiver of immunity under such circumstances an act of misconduct justifying dismissal? Does his dismissal deprive him of equal protection of the laws and violate his privilege against self-incrimination?"

Statement of the Case

The Appellant is a forty-three-year-old Patrolman appointed on October 1, 1949, to the New York City Police force after competitive examination, and is an honorably discharged veteran of the Navy with wartime service (A3). On August 4, 1965, he was served by the Police Department with two charges of misconduct alleging conspiracy to violate the gambling laws of the State of New York and was suspended (A48, A22). The next day, August 5, 1965 and the following day, August 6, 1965, the Appellant

appeared pursuant to subpoena before the New York County Grand Jury (A11, A12, A19). Each time the Appellant was informed that the Grand Jury was conducting an investigation to determine whether a conspiracy was in existence between various members of the Police Department and various gamblers to bribe police officers and violate gambling laws (A13, A20). On both occasions he was requested to sign a waiver of immunity and testify pursuant to the City Charter and State Constitution (A16, A21). At the August 5th appearance, he was directed to return on August 6, 1965 and the Appellant requested another date to return because he was scheduled to appear in the Police Department trial room on the existing charges on August 6, 1965 and was "fighting for my job" on that date (A17); the request for an adjournment was denied. When he returned on August 6, 1965 he declined to sign a waiver of immunity, stating that since he was a target of the investigation, there was no authority on the part of the Grand Jury to subpoena and question him (A21). He was thereupon excused. On the same day, August 6, 1965, the District Attorney wrote to the Police Commissioner to report the refusal to sign a waiver and further stated that since it was not the intention of the Grand Jury to confer immunity, the Appellant was not questioned (A11-A12). A separate charge of misconduct, refusal to sign a waiver of immunity before the Grand Jury, was served upon the Appellant and he was ordered to report for a hearing on that charge on August 10, 1965 (A22). On August 10, 1965 a hearing was held on the one charge of refusal to sign a waiver of immunity; a demand by Appellant that all three charges then existing be tried was denied (A25-A26). The Assistant District Attorney testified that the Grand Jury was investigating crimes of bribery by

gamblers of police officers (A28); that the Grand Jury wished to question him concerning the conduct of his office and was asked to sign a waiver of immunity (A28); and that the Appellant refused stating it was inappropriate because he was a target of the investigation (A28); the minutes of the appearances were then placed into evidence (A29). On cross examination the witness testified that the Appellant was a possible defendant in the Grand Jury inquiry (A30-A31). A motion to dismiss on the ground that the Appellant was a target of the Grand Jury investigation and hence was illegally subpoenaed was made at the close of the case (A32), and decision was reserved. The next day, August 11, 1965, the Appellant was dismissed solely for his refusal to sign a waiver of immunity (A34). No disposition of the remaining charges was made. Thereafter a petition to the Supreme Court was served requesting reinstatement and full back pay on the ground that the Appellant was illegally dismissed in violation of constitutional rights (A4). The answer and return set forth the basis of dismissal—refusal to sign a waiver of immunity as required by the City Charter and State Constitution (A6-A8). The Appellant's reply thereto alleged that he had not been convicted of any act of misconduct or incompetence because such requirements of office were unconstitutional (A36). The Appellate Division of the Supreme Court confirmed the Appellees' determination without opinion (A37-A38). The Court of Appeals unanimously affirmed (A45-A47) with an opinion by Fuld, J. (A41-A45). On appeal to this Court, probable jurisdiction was noted January 29, 1968 (A53).

ARGUMENT

State requirements of public office which require a waiver of the right against self-incrimination guaranteed by the United States constitution, upon pain of dismissal, are unconstitutional; the refusal of a state employee to waive immunity under such circumstances is not an act of misconduct justifying dismissal; calling a public officer before the Grand Jury to execute such waiver when he is a target of the investigation is illegal and all consequences flowing therefrom are similarly illegal.

The Fourteenth Amendment secures against state invasion, the same privilege that the Fifth Amendment secures against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty for such silence. *Malloy* v. *Hogan,* 378 U. S. 1, 8; *Griffin* v. *California,* 380 U. S. 609, 613. Neither the Fourteenth Amendment nor the Fifth Amendment have any proviso excluding public officers from the full benefit of the rights conferred therein. The two sections of law under review, Article I, Section 6 of the *New York Constitution* and Section 1123 of the *New York City Charter* seek by their terms to except public officers from the full protection of the Federal Constitution. The Court of Appeals of the State of New York, in the opinion in this case stated, "It is clear, and was so understood by the petitioner, that section 1123 of the Charter required him, as a condition of his continued employment by the police department, to waive his constitutional privilege against self-incrimination, and to answer questions regarding the conduct of

his office and the performance of his official duties" (A42-A43). The sections of law under review thus use the threat of loss of employment against the assertion of constitutional privilege. This attempt by the state to add a proviso to federally protected liberties must be declared unconstitutional in that it violates supremacy of federal law. *Marbury* v. *Madison,* 1 Cranch (U. S.) 137; *United States Constitution,* Art. VI, Sec. 2. The threat of loss of employment unless the public officer waives a constitutionally conferred privilege is coercion which is a fetter on free speech and the testimony extracted thereby is compelled testimony. *Garrity* v. *New Jersey,* 385 U. S. 493. The Bill of Rights protects against criminal and quasi-criminal civil punishment. *Garrity* v. *New Jersey, supra* (use in criminal prosecution); *United States* v. *Lovett,* 328 U. S. 303, 316 (loss of pay and position); *Boyd* v. *United States,* 116 U. S. 616; *Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693 (both involving forfeiture of goods); *Schlochower* v. *Bd. of Education,* 350 U. S. 551 (administrative dismissal from public office); *Steinberg* v. *United States,* 141 Ct. Cl. 1, 163 F. Supp. 590, cited with approval in *Sherbert* v. *Verner,* 374 U. S. 398, 404, n. 6 (loss of federal vested pension rights); *Spevack* v. *Klein,* 385 U. S. 551 (disbarment). The opinion of the New York Court of Appeals in the case at bar recognized that the holding of *Garrity* undoubtedly partially invalidated the sections under review insofar as they permit testimony gained thereunder to be used in a criminal prosecution, but went on to say that the testimony could be used to support an act of misconduct justifying dismissal (A43). However, it is the method of attainment which taints the testimony as compelled. The changing of the use of that testimony from criminal to administrative hearings does

not make it any less compelled. A threat of loss of one's livelihood is a fetter on free speech and the choice to speak under such circumstances is not a free choice. *Garrity* v. *New Jersey, supra.* Freedom of choice does not mean being subjected to alternatives, each of which carries potential adverse consequences to the person making the choice. *Union Pacific Ry. Co.* v. *Public Service Commission,* 248 U. S. 67; *Frost* v. *Railroad Commission,* 271 U. S. 583; *Baggett* v. *Bullett,* 377 U. S. 360. Thus the alternative of being subjected to consequences of loss of employment unless he waives a constitutionally protected right is an alternative which does not secure the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty for such silence. *Malloy* v. *Hogan, supra.*

It is therefore abundantly clear that the sections under review are unconstitutional. The Court of Appeals of the State of New York in its opinion found no constitutional defect in the statutes as it applied to the Appellant (A43), in spite of the fact that the Appellant was dismissed solely for refusal to sign the waiver of immunity which is an act of asserting the privilege (A41-A43). Nowhere in the Record was it suggested to the Appellant that the testimony which he was asked to give was not going to be used in a criminal proceeding against him. In fact he was informed that the investigation was a criminal one and that his conduct was being inquired into and he was asked to waive immunity (A20-A21). In addition, the sections under review, authorizing the request for waiver are cast in terms of and contemplate criminal prosecution. At no time was Appellant informed that the testimony would not be used against him criminally and used only adminis-

tratively. The Court of Appeals of New York in its opinion indicates that the question of the constitutionality of the sections under review, "may still be an open one" (A43), citing *Stevens* v. *Marks,* 383 U. S. 234, 243 and *Spevack* v. *Klein, supra,* yet countenances by affirmation the dismissal of this Appellant for a course of action which is consistent with a good faith recognition of the questionability of the sections. Such good faith action should not result in a finding of misconduct justifying punishment. See: *In the Matter of the Investigation Into Alleged Commission of Criminal Abortions in the County of Kings,* 206 Misc. 830, aff'd 286 App. Div. 270, lv. to app. den. 309 N. Y. 1031, 135 N. Y. S. 2d 381, aff'd 143 N. Y. S. 2d 501.

It has been suggested that a public officer has a duty to account to the state for the conduct of his office, and the failure to do so is insubordination and misconduct. *Spevack* v. *Klein, supra* (concurring opinion per Fortas, J. at 385 U. S. 511, 520). The advance relinquishment of constitutional guarantees is not an essential prerequisite to such duty as may exist. A public officer can account for his actions without the necessity of waiving his privilege just as any other individual can. See: *Matter of Grae,* 282 N. Y. 428, 26 N. E. 2d 963. A major consideration is who is doing the questioning and what is the status of the officer being questioned, and for what purpose will the results of the examination be used. An officer on active duty who is not under charges of misconduct and who is being questioned by his natural superior, such as a commissioner of the department, is in an entirely different category than one who is being questioned by the commissioner or Grand Jury after he is under departmental charges, wherein his superior has become his judge, and the officer

has a right to assume a defensive posture best calculated by him to resist and defeat the existing charges, including silence at his own removal hearing. *Schawecker* v. *Green*, 96 App. Div. 249, 254, 89 N. Y. S. 343. Once charges are served the burden of proof of misconduct is upon the party alleging them and the device of extracting testimony from the accused under threat of loss of employment would shift the burden of proof upon the accused. *Laws, 1940*, Ch. 834; *Civil Service Law*, Sec. 75. Even were he not under existing charges, if the inquiry is made by the Grand Jury—which is not his natural superior—and he is asked to account for his actions upon threat of removal unless he waives his constitutional privilege, it is not an act of misconduct for him to refuse to do so. The Grand Jury is not the Commissioner. Unlike the Commissioner, it has contempt of Court powers and powers to indict for perjury, which powers are sometimes used to secure imprisonment of the witness by use of procedural devices to overcome the lack of substantive proof of the crime being investigated. Obscure questions, the answers to which may in good faith be unknown to the witness, or the impression that a district attorney may have that the witness is being evasive, subject the witness to the harassment expense to defend ill-founded indictments for perjury or contempt of court, and danger of imprisonment. See: e.g. *Stevens* v. *Marks*, 383 U. S. 234. A Civil Service employee in the competitive class is a protected employee. Unlike a private employer who can arbitrarily or unreasonably discharge a private employee, the state or city is held to a degree of procedure embodied in *Civil Service Law*, Sec. 75 and *Laws, 1940*, Ch. 834, which are consistent with due process of law. This is necessary because the Fourteenth Amendment protects against state rather than private action.

Moreover, the opinion of the Court of Appeals of New York deprives Appellant of equal protection of the laws, in that the New York State Legislature has specifically provided that a police officer can only be dismissed after a hearing on stated charges with a right to counsel with the burden of proving the misconduct to be upon the Department. *Laws, 1940,* Ch. 837; *Civil Service Law,* Sec. 75. By compelling the Appellant, who was then under departmental charges encompassing the same area of Grand Jury inquiry (A48, A41, A13, A20, A11), to testify upon threat of dismissal, and then to use any testimony relating to misconduct against the officer in his own removal hearing as suggested by the Opinion below (A43), the result would shift the burden of proof upon the accused from the accuser, without introduction of extrinsic evidence independently gathered. This procedure violates the requirements of proof by the accuser. It also violates the basic concepts of due process of law guaranteed by the Fourteenth Amendment because other officers enjoy the protection of the Civil Service sections cited whereas those in Appellant's position do not. The introduction of such testimony at the removal hearing is contrary to the holding that a civil service employee need not testify at his own removal hearing because his superior has changed roles to that of his judge. *Schawecker* v. *Green,* 96 App. Div. 249, 254, 89 N. Y. S. 343. The effect of the opinion is to overrule this concept of due process of law, making an accusatorial system into an inquisitional one. See: *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55.

The decision below also disregards the fact that the Appellant herein was illegally subpoenaed before the Grand Jury in the first place, and that all consequences flowing

therefrom are illegal. The Appellant was suspended and under departmental charges of conspiracy to violate the gambling laws and to commit bribery (A48, A22), at the time he was subpoenaed before the Grand Jury. While before the Grand Jury he was informed that the Grand Jury was conducting an investigation to determine whether the crimes of conspiracy to violate the gambling laws and to commit bribery were in existence (A13, A20). He thereupon was requested to sign a waiver of immunity and to testify as to his conduct of his office (A16, A21), at a time when he was "fighting for my job in the Police Department at the trial room" (A17). These facts lead to the inescapable conclusion that at the time he was subpoenaed before the Grand Jury Appellant was a target of the Grand Jury investigation, a conclusion which was confirmed by the Assistant District Attorney at the Departmental Hearing wherein the Appellant was described as a potential defendant of the investigation (A30-A31). At the Grand Jury hearing, Appellant explained his refusal to sign the waiver of immunity by stating that since he was a target of the investigation, there was no authority to subpoena and question him (A21). This explanation was repeated in the Departmental hearing by way of motion to dismiss the charge on the ground that Appellant's appearance before the Grand Jury was illegal because the authority of the Grand Jury to subpoena is limited to witnesses who are in truth and fact witnesses and not to targets of the investigation, citing *People* v. *Steuding,* 6 N. Y. 2d 214, 160 N. E. 2d 468. This contention is also supported by *Matter of Bernoff* v. *Amoroso,* 188 Misc. 845, aff'd 271 App. Div. 925, 65 N. Y. S. 2d 810, aff'd 67 N. Y. S. 2d 701 wherein the court stated at 188 Misc. 845, 847:

"* * * Attendance of persons before a grand jury is governed exclusively by §609 of the Code of Criminal Procedure which authorizes the District Attorney to issue subpoenas for 'witnesses' to appear before the grand jury, upon an investigation pending before them.' This is the only provision of law which empowers the district attorney to compel the appearance of a person before the grand jury. * * * Section 609 specifically limits persons for whom subpoenas may be issued to 'witnesses'. The generic term 'persons' is not used. This is clear recognition of the distinction which exists between persons who are the objects of grand jury inquiry and 'witnesses'. Accordingly the grant of power to subpoena persons to appear before a grand jury is limited to 'witnesses.' * * *"

Because Appellant was a target of the investigation, he was illegally before the Grand Jury and all consequences flowing therefrom were illegal. To give effect to consequences flowing therefrom deprived Appellant of equal protection of the laws, in that persons in his group—targets of the investigation—are excluded from the power of the Grand Jury to subpoena, and Appellant was not so excluded. The Department also denied a demand that the two existing substantive charges be tried at once together with the additional charge of refusal to sign a waiver of immunity. The demand was denied (A25-A26, A6). Thus Appellant was dismissed solely for invoking his constitutional privilege without any evidence of substantive acts of misconduct as a legal residuum. The Department used a procedural device employing deprivation of constitutional liberty to overcome its lack of substantive evidence of misconduct. The refusal of the Department to accord a speedy and immedi-

ate trial of the existing charges also constituted a deprivation of due process of law.

The practical results of the procedures followed in this case are a graphic portrayal of what happens when a state seeks to disregard constitutional liberties and employ force, fear and threats to extract information from an accused rather than employ skillful investigative techniques leading to independent extrinsic evidence. All that the Appellant's family, friends and prospective employers know is that the Appellant was dismissed from the department while serious charges of substantive misconduct were made against him. They cannot know that he was never convicted of any substantive wrongdoing without a careful study of the procedures and nuances of this case. He has been punished to the full extent under sections of law whose legality is termed open to question by the Court of Appeals of New York, which laws seek to dilute protected federal privileges of public officers. This procedural device has been used to overcome an apparent lack of evidence of the substantive charges of misconduct which the Department refused to try, although trial was duly demanded. These results are inconsistent with constitutional liberties.

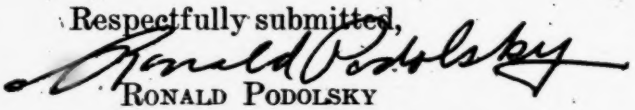
The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right. Long regarded as a safeguard of civil liberty, it was firmly imbedded in the law of England and by the Fifth Amendment to the Federal Constitution became a basic principle of American constitutional law. "It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the State; and neither legislators nor judges are free to overleap it." *Matter of Doyle,* 257 N. Y. 244, 250. When the Appellant

as a witness upon the inquiry at the Grand Jury declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. The constitutional privilege is a fundamental right; its exercise cannot be a breach of duty. It follows that, upon the facts disclosed by the record, the finding of the disciplinary proceeding against the Appellant, wherein the single offense charged was his refusal to yield a constitutional privilege, was not warranted as a finding of misconduct. See *Matter of Grae,* 282 N. Y. 428, 26 N. E. 2d 963. Hence the Appellant was never convicted of any justiciable act of misconduct and he should be restored to his position with back pay.

CONCLUSION

Article I, Section 6 of the *New York State Constitution* and Section 1123 of the *New York City Charter* are unconstitutional; Appellant was never convicted of any justiciable act of misconduct; the court below should be reversed and the appellant restored to his position with full back pay.

Respectfully submitted,



RONALD PODOLSKY
Attorney for Appellant
15 Park Row
New York, New York 10038

March, 1968.

APPENDIX TO THE BRIEF

New York State Constitution, Article I, §6

New York State Constitution, Article I, §6, reads,

[Grand jury; protection of certain enumerated rights; duty of public officers to sign waiver of immunity and give testimony; penalty for refusal.] §6. No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of

such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 8, 1949; November 3, 1959.)

New York City Charter, §1123

New York City Charter, §1123 reads;

§1123. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits. or regarding the nomination, election, appointment or official conduct of any officer or employee of the city of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or

inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (Derived from former §903.)

Laws, 1940, Ch. 834

Laws, 1940, Ch. 834 reads:

Section 1. Removal of policemen serving in the competitive class of civil service in the several cities, counties, towns and villages of the state. A policeman serving in the competitive class of civil service in any city, county, town or village of the state, any provision of law, rule or regulation to the contrary notwithstanding, shall not be removed from his position except for incompetency or misconduct shown after a hearing upon due notice upon stated charges, and with the right to such policeman to be represented by counsel at such hearing and to a judicial review in accordance with the provisions of article seventy-eight of the civil practice act. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Hearings upon charges pursuant to this act shall be held by the officer or body having the power to remove the person charged with incompetency or misconduct or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body, and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision.

§2. This act shall take effect immediately.

Civil Service Law §75(2)

Civil Service Law §75(2) reads:

Section 1. Subdivision two of section seventy-five of the civil service law, as added by chapter seven hundred ninety of the laws of nineteen hundred fifty-eight, is hereby amended to read as follows:

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other [employee of] *person designated by* such officer or body [designated] in writing for that purpose. In case a deputy or other [employee] *person* is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

§2. This act shall take effect immediately.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 635

ROBERT VINCENT GARDNER,

Appellant,

v.

VINCENT L. BRODERICK as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE*

The Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA") hereby moves for permission to file a brief as *amicus curiae* in this case.

The attorney for the appellant has consented to this *amicus* appearance. The attorney for the appellees has not responded to requests for his consent, necessitating this motion.

The PBA is a line organization of the New York City Police Department and is certified by the City of New York as the exclusive bargaining representative of the Department's 28,000 patrolmen. The PBA is interested in all matters affecting the welfare and the rights and interests of New York City patrolmen.

The appellant herein, Robert Vincent Gardner, is a former patrolman of the New York City Police Department who was discharged for refusing to waive his Fifth Amendment privilege before a Grand Jury. The PBA is interested in his case because it raises a question of major significance for New York City policemen: namely, whether waiver of the privilege against self-incrimination can be made a valid condition of continuance in office.

It is possible that the interest and point of view of the appellant may not altogether coincide with those of policemen generally. All policemen will be seriously effected by the decision in this case and it is appropriate that their views should be presented by an organization representative of their common interest.

For the foregoing reasons, it is requested that the PBA be permitted to file a brief as *amicus curiae*.

Respectfully submitted,

MICHAEL J. SILVERBERG,
Counsel for Patrolmen's Benevolent Association of the City of New York, Inc.,
1501 Broadway,
New York, N.Y. 10036.

March 13, 1968.

SUPREME COURT, U. S.

APR 8 19

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

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ROBERT VINCENT GARDNER,
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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. AS *AMICUS CURIAE*

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1501 Broadway,
New York, New York, 10036,
Attorney for Amicus Curiae.

IN THE

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ROBERT VINCENT GARDNER,

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. AS *AMICUS CURIAE*

Interest of *Amicus*

The Patrolmen's Benevolent Association of the City of New York, Inc. ("P.B.A.") is a line organization of the New York City Police Department and is certified by the City of New York as the exclusive bargaining representative of the Department's 28,000 patrolmen. The PBA is interested in all matters affecting the welfare and the rights and interests of New York City patrolmen.

The appellant herein, Robert Vincent Gardner, is a former patrolman of the New York City Police Department who was discharged for refusing to waive his Fifth Amendment privilege before a Grand Jury. The P.B.A. is interested in his case because it raises a question of major significance for New York City policemen as well as for public employees generally: namely, whether waiver of the privilege against self-incrimination can be made a valid condition of a public job.

ARGUMENT

Dismissal of the appellant from the New York City Police Department for refusing to waive his constitutional privilege against self-incrimination violated the Fifth Amendment to the United States Constitution. The provisions of the New York State Constitution and New York City Charter requiring such dismissal are unconstitutional.

The Fifth Amendment to the Constitution of the United States provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." The appellant, Robert Vincent Gardner, appeared pursuant to a subpoena before a Grand Jury investigating an alleged gambling conspiracy involving New York City policemen. He was warned "that under the Constitution of the State of New York,* as well as the Charter of the City of New York,* that a public officer, which includes a police officer, when called before a Grand Jury to answer questions concerning the conduct of his public office and the performance of his duties is required to sign a waiver of immunity if he wishes to retain that public office" (A 20). Gardner refused to sign such a waiver of immunity and was excused without being questioned. Thereafter, he was discharged from his position in the Police Department for the sole reason that he had refused to sign a waiver of immunity as required by Section 1123 of the New York City Charter (A 34). *Amicus* supports appellant's contention that his discharge violated his rights under the Fifth Amendment.

In *Malloy* v. *Hogan*, 375 U.S. 1, 8 this Court said:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth

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* The pertinent provisions of Article 1, Section 6 of the Constitution of the State of New York and Section 1123 of the New York City Charter, here in issue, are reprinted in the Appendix to Appellant's Brief.

> Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence."

Commenting on this rule, Mr. Justice Douglas, writing for the Court in *Spevack* v. *Klein*, 385 U.S. 512, 515 stated:

> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin* v. *California*, 380 U.S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'."

The appellant herein faced a choice similar to the one condemned by this Court in *Garrity* v. *State of New Jersey*, 385 U.S. 493, 497:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty for self-incrimination is the antithesis of free choice to speak out or to remain silent."

The choice the appellant faced was indeed harsher than the one given the police officers in *Garrity*. He was not merely directed to testify but was asked, before testifying, to sign a waiver of immunity from criminal prosecution based on his testimony. In short he was asked to waive the very rights secured to him by the decision of this Court in *Garrity* v. *State of New Jersey, supra*.

In *Garrity*, police officers called before a Deputy Attorney General empowered to investigate an alleged scheme to fix traffic tickets, were warned that they had the right to remain silent but that they were subject to discharge under New Jersey law if they exercised their Fifth Amendment privilege. This Court ruled that their testimony under such circumstances was involuntary and could not be used against them in subsequent criminal proceedings. The

Court reserved the question, as noted in the companion *Spevack* case, "whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify . . ." (385 U.S. at 516, n. 3) but the present case is not within the ambit of the question thus reserved. The present appellant did not decline to answer questions about his official conduct put to him by a superior officer in disciplinary proceedings. As in *Garrity*, he was being interrogated by a body outside the Police Department charged with developing evidence for the purpose of criminal prosecution. The outside body was a Grand Jury whose specific purpose it was to investigate and indict policemen for criminal acts; and it was conceded by the Assistant District Attorney that the appellant was a potential defendant (A 30, 31). Furthermore, as previously noted, the appellant was not merely called upon to testify but was directed before testifying to sign a written waiver of immunity from prosecution based on his testimony. It was specifically and solely for his refusal to sign the waiver of immunity that the appellant was discharged (A 34).

In the present case there was a Police Department disciplinary hearing, but it was directed at one question and one question alone: whether the appellant had in fact declined to sign a waiver of immunity upon request to do so before a Grand Jury. Patrolman Gardner's attorney specifically requested that the hearing not be limited to this question and that the charges of misconduct pending against Gardner be tried at the same time (A 25). His request was denied. The only testimony taken at the hearing related to the charge that Garner had declined to sign a waiver of immunity. The Trial Commissioner's report to the Police Commissioner concluded that "Gardner refused to waive immunity from prosecution as required by Section 1123 of the New York City Charter. It is therefore recommended that the employment of the said suspended Patrolman Robert

V. Gardner be terminated and his office vacated as of August 5, 1965" (A 33). The Police Commissioner then issued the following order discharging Gardner:

> "Suspended Patrolman Robert V. Gardner, Shield #18984, 5th Precinct, having appeared before the Grand Jury of New York County on the 6th day of August, 1965, and having refused to waive immunity from prosecution as required by Section 1123 of the New York City Charter, and a hearing having been held in connection therewith, his employment in the Police Department of the City of New York is terminated and his office vacated effective August 6, 1965.
>
> /s/ Vincent L. Broderick*
> VINCENT L. BRODERICK
> Police Commissioner
>
> Dated: August 11, 1965"

Even under the principles espoused by the dissenting minority in *Garrity* v. *State of New Jersey*, it is recognized that it is improper for a police officer's discharge to be "predicated on an imputation of guilt drawn from the use of the privilege", 385 U.S. at 508 (dissenting opinion of Harlan, J.). The dissenting Justices, while unwilling "to assume that discharges will be used either to vindicate impermissible inferences of guilt or to penalize privileged silence . . ." (385 U.S. at 509) recognized that such use of the penalty of discharge is constitutionally impermissible. In the present case, it is clear that Gardner's discharge was predicated on nothing else but his refusal to surrender his Fifth Amendment privilege and was ex-

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* Vincent L. Broderick, former Police Commissioner of the City of New York, and one of the named defendants in the present suit, is now a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, which firm is of counsel to the Patrolmen's Benevolent Association of the City of New York, Inc. as *amicus curiae* herein. Mr. Broderick has had no connection with this *amicus* appearance and obviously disassociates himself from the position taken in this brief.

pressly intended to penalize his silence. Section 1123 of the New York City Charter, directing that upon a refusal to waive immunity, the term of office of any officer or employee of the City "shall terminate and such office or employment shall be vacant" and Article 1, Section 6 of the New York State Constitution providing that any public officer who refuses to waive immunity before a Grand Jury "shall by virtue of such refusal, be disqualified from holding any other public office or employment for a period of five (5) years, and shall be removed from office by the appropriate authority . . ." are by their terms expressly intended to impose a penalty for privileged silence, without leaving room for the kind of "effort in good faith to assess . . . qualifications" of a public employee which Mr. Justice Harlan would have allowed in *Spevack* v. *Klein* (see 385 U.S. at 528) and *Garrity* v. *State of New Jersey* (see 385 U.S. at 508).

The rights secured by the *Garrity* case would be illusory if they could be circumvented by using the threat of discharge to extract a waiver. Whereas a statute providing for forfeiture of office upon refusal to testify presents a harzard to the integrity of the Fifth Amendment privilege which may perhaps be partially avoided by excluding the use by prosecuting authorities of information obtained by threats of dismissal (see *Spevack* v. *Klein*, 385 U.S. at 528 (opinion of Harlan, J.), 385 U.S. at 532 (opinion of White, J.)), this cannot be said of a law which uses the threat of discharge to force a public officer to waive such immunity from subsequent prosecution based on his testimony.

The New York Court of Appeals, in its decision below, appears to have assumed that the waiver, if signed, would have been invalid. The Court of Appeals stated that "If the petitioner before us had executed the waiver required by Section 1123 and then testified about misconduct in office, his testimony, *though inadmissible in a criminal*

prosecution, would, nevertheless, have furnished sufficient cause to justify his dismissal from the police force" (A 43) (emphasis added). It is clear, however, that the prosecuting authorities did not believe that the appellant, if he had signed a waiver and testified, would have remained immune from criminal prosecution. In referring Gardner's case to the Police Commissioner, the Assistant District Attorney expressly stated that Gardner was not questioned after he declined to sign the waiver because "it was not the intention of the District Attorney to request the Grand Jury to confer immunity upon him" (A 11-12). The appellant had reason to fear (as the State had reason to hope) that the waiver would have the effect obviously intended by New York Law: to permit appellant's criminal prosecution based on his own testimony. Such a result is repugnant to principles accepted by all of the Justices in *Garrity* and *Spevack.*

This Court has rejected the theory also relied upon by the New York Court of Appeals below, that "Although people in public office and on public payroll may not be compelled to surrender their constitutional privilege against self-incrimination . . . they have no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties" (A 44). As this Court stated in *Garrity* v. *New Jersey,* 385 U.S. at 499:

> "The question in this case, however, is not cognizable in those terms. Our question is whether the Government, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against the employee.
>
> We held in Slochower v. Board of Education, 350 U.S. 551, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee
>
> . . .
>
> We conclude that policemen, like teachers and lawyers are not relegated to a watered-down version of constitutional rights."

Similarly, this Court stated in *Spevack* v. *Klein*, 385 U.S. at 516:

> "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words 'No person . . . shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. Like the school teacher in Slochower v. Board of Education, 350 U.S. 551, and the policeman in Garrity v. New Jersey, 385 U.S. 493, lawyers also enjoy first-class citizenship."

It would be difficult for policemen to understand a theory of constitutional law which deprives them of a constitutional privilege extended to teachers, lawyers and all others on the ground that policemen have a higher standard of duty to the public. It should indeed be difficult for lawyers and teachers to accept such a theory. While *amicus* fully subscribes to the proposition that police officers owe the highest measure of devotion to their sworn duty to uphold the law, it does not follows from this proposition that enforcement of that high standard requires a zealotry which sweeps aside constitutional rights. Nor does the public's claim to protection require such a sacrifice. Unlike lawyers, who may continue in unrestricted practice and even assume judicial office after invoking the Fifth Amendment, a policeman is subject to more stringent controls. He may be temporarily suspended or confined to non-sensitive duties upon mere suspicion, while appropriate agencies investigate the facts. The continuance of his salary while lawful avenues of investigation are pursued is the only price which need be paid by the public for respecting the constitutional rights of a policeman, as he is required to respect and enforce the similar rights of all citizens.

Even if it were proper, however, to single out police officers and to withdraw from them the right "to remain silent . . . and to suffer no penalty . . . for such silence"

(*Malloy* v. *Hogan*, 378 U.S. 1, 8) this Court has held that such discriminatory treatment cannot extend so far as to permit a police officer to be criminally prosecuted on the basis of evidence extracted from him on pain of discharge. *Garrity* v. *State of New Jersey, supra. Amicus* submits that it necessarily follows that the State of New York may not use the threat of discharge to compel a policeman to waive that very immunity from prosecution based on testimony thus extracted. Appellant's dismissal for refusing to waive such immunity violated his rights under the Fifth Amendment. The provisions of the New York City Charter and New York State Constitution requiring such dismissal are unconstitutional and therefore invalid.

Conclusion

The decision of the New York Court of Appeals should be reversed. Article 1, section 6 of the New York State Constitution and section 1123 of the New York City Charter are unconstitutional and should be so declared by this Court. Appellant should be restored to his position as a patrolman in the New York City Police Department.

Respectfully submitted,

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March 1968

SUPREME COURT, U. S.
(39053)

APR 13 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 635

ROBERT VINCENT GARDNER,

Appellant,

v.

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEES' BRIEF

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IN THE

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No. 635

ROBERT VINCENT GARDNER,

Appellant,

v.

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEES' BRIEF

Statement

This is an appeal from a final judgment of the New York Court of Appeals [R. 41-47, 20 N Y 2d 227, 229 N. E. 2d 184 (1967)], affirming a judgment of the Supreme Court of the State of New York, Appellate Division, First Department [R. 37-39, 27 A D 2d 800, 279 N.Y.S. 2d 150 (1967)], which confirmed a determination of the Police

Commissioner dismissing appellant from the position of patrolman in the Police Department of the City of New York.

On January 29, 1968, this Court noted probable jurisdiction (R. 53).

Question Presented for Review

Where a police officer, after being called before a grand jury and refusing to sign a waiver of immunity with respect to testimony concerning the conduct of his office and the performance of his official duties, is granted a hearing at which he fails to offer any explanation of such refusal and is thereafter dismissed from his position pursuant to Article I, Section 6, of the New York Constitution and Section 1123 of the New York City Charter, does such dismissal violate his rights under the United States Constitution when, if the police officer had testified before the grand jury, the testimony could not be used against him in subsequent criminal proceedings?

Facts

A. Charge Against Appellant

The charge against the appellant was, as follows (R. 22-23):

> "The District Attorney of New York County has advised the Police Commissioner that you were called and appeared before the Grand Jury of New York County on the 6th day of August, 1965, and that you refused to waive immunity from prosecution as provided in Section 1123 of the New York City Charter and Article I, Section 6 of the Constitution of the State of New York.
>
> "You are, therefore, directed to appear before a Trial Commissioner in the Board Room on the second

floor of Police Headquarters, 240 Centre Street, New York, New York, on the 10th day of August, 1965, at 2:30 P.M., to show cause why your employment as a member of the Police Department should not be terminated and your office vacated as prescribed by the aforesaid provisions of law."

B. Departmental Hearing

The charges against the appellant were tried before Leonard E. Reisman, Hearing Officer, on August 10, 1965. The appellant was present and was represented by counsel (R. 23).

At the hearing the Police Department introduced in evidence a letter from Assistant District Attorney Andreoli of the New York County District Attorney's Office, advising the Police Commissioner that appellant had refused to sign a limited waiver of immunity (R. 24, 26). A copy of the notice of the charge was offered in evidence and was objected to by the appellant, who also moved to have two other charges then pending against him included in this limited hearing. The Hearing Officer overruled the objection, denied the motion and admitted in evidence the letter from the District Attorney's Office and the notice of the charge (R. 24, 26).

Assistant District Attorney Andreoli's Testimony

Assistant District Attorney Andreoli testified that the appellant was called before the Second August 1965 Grand Jury in New York County on August 5, 1965, and was tendered a limited waiver of immunity but was not placed under oath (R. 27). He further testified that the appellant was advised that the Grand Jury "wished to question him concerning the conduct of his office in the performance of his duties" and, at appellant's request, there was an adjournment to enable him to discuss the limited waiver with his attorney (R. 28).

On August 6, 1965, appellant reappeared and was again advised of his rights and the nature of the investigation. The investigation sought to determine whether the crimes of conspiracy to bribe public officers had been committed, specifically concerning bribes by gamblers to police officers to aid in the continuance of unlawful gambling (R. 28).

The appellant then refused to sign a waiver of immunity because "his attorney told him he was a target of an investigation" (R. 20-21, 28, 29).

The Department next offered the unsworn statements of appellant before the Second August 1965 Grand Jury and a copy of the limited waiver of immunity, which were admitted in evidence over objection (R. 29-30, 12-22; Brief p. 22).

On cross-examination, Andreoli testified that appellant appeared before the Grand Jury pursuant to a subpoena and that he was a potential defendant of the investigation (R. 30). He further testified that, had the appellant signed the limited waiver of immunity, he would have been questioned at that time (R. 31).

The Court order releasing the Grand Jury minutes was then admitted in evidence (R. 32).

Appellant's Grand Jury Testimony

The grand jury minutes of the Second August 1965 Grand Jury, which had previously been admitted in evidence (R. 29-30), disclosed that appellant appeared as a witness and was not sworn. He was advised of the nature of the Grand Jury investigation, which he stated he understood and had been aware of since June of 1964 (R. 13). After his constitutional right to refuse to testify and the provisions of the Constitution of the State of New York and the New York City Charter with regard to refusal to testify concerning the conduct of his public office had been explained, appellant stated that he was represented by

counsel, who was not present. He requested an adjournment in order to show the limited waiver of immunity to his attorney. This request was granted (R. 14-18).

On August 6, 1965, appellant was recalled as a witness, but was not sworn. He was again informed of the nature of the Grand Jury investigation (R. 19-20). He stated that he had discussed his constitutional rights and his duty to testify with his attorney and stated, "On the advice of my attorney I have been regarded as a target of this investigation, and you have no authority to question me." He was then advised that he had been called before the Grand Jury as a public officer to testify concerning the performance of his duties as a police officer (R. 20-21). Appellant refused to sign the waiver of immunity (R. 21-22).

Motion to Dismiss

Decision was reserved on the appellant's motion to dismiss the charge on grounds that he had been subpoenaed and was a target of the investigation (R. 32-33).

Appellant's Case

Appellant did not offer any evidence on his behalf or offer any explanation of his refusal to sign the waiver of immunity and testify before the Grand Jury (R. 33).

C. Commissioner's Determination

In the report of Hearing Officer Reisman, dated August 11, 1965, he found that appellant had been called before the Grand Jury and had refused to sign a waiver of immunity as required by Section 1123 of the New York City Charter. He recommended that appellant's employment be terminated and his office vacated (R. 33).

Based on these findings and recommendations, Police Commissioner Broderick ordered appellant's office vacated (R. 34).

Opinions Below

The Appellate Division, First Department, of the Supreme Court of the State of New York, confirmed without opinion the Police Commissioner's determination (R. 37-39, 27 A. D. 2d 800, 279 N.Y.S. 2d 150 [1967]).

The New York Court of Appeals, in its opinion by Chief Judge Fuld, unanimously affirmed the order of the Appellate Division (R. 41-47). It pointed out that the appellant was required by Section 1123 of the New York City Charter, as a condition of his continued employment by the Police Department, to waive his constitutional privilege against self-incrimination and to answer questions relating to the conduct of his office and performance of his official duties. The Court distinguished *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), stating that nothing decided in that case bore on the issue before the Court and that any testimony of misconduct in office would be inadmissible in a criminal prosecution. It said that *Spevack* v. *Klein*, 385 U. S. 511 (1967), was also distinguishable in that *Spevack* involved the responsibilities of a licensed attorney rather than those of a State employee. Chief Judge Fuld concluded (R. 43-44):

> "In point of fact, the petitioner did not execute the waiver and stood on his constitutional privilege against self-incrimination when notified that he was to be questioned about malfeasance as a police officer. Such information patently bore upon his fitness to remain in office, information which the public had a right to know and the petitioner was under a duty to reveal. His refusal to speak on the subject constituted 'employee insubordination for failure to give information which * * * the State has a legitimate interest in securing' (*Nelson* v. *Los Angeles County*, 362 U. S. 1, 7, *supra:* see *Spevack* v. *Klein*, 385 U. S. 511, 519, *supra* [per Fortas, J., concurring]), and, consequently, he was properly dismissed from the police force."

Constitutional Provision and Statute Involved

Section 6 of Article I of the New York Constitution provides, as herein pertinent, as follows:

§ 6. (Grand Jury; protection of certain enumerated rights; waiver of immunity by public officers; due process.)

"* * * No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

The New York City Charter, Section 1123, provides as follows:

"§ 1123. Failure to testify.—If any councilman or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive im-

munity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Summary of the Argument

In the cases of *Beilan* v. *Board of Education*, 357 U. S. 399 (1958), *Lerner* v. *Casey*, 357 U. S. 468 (1958), and *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960), this Court sustained the dismissals of public employees, after appropriate administrative hearings, based upon the employees' failure to explain their refusal to answer questions relating to their employment in an investigation of matters of legitimate concern to the state or agency involved or their refusal to take a loyalty oath. The appellant, a police officer, refused to execute a waiver of immunity and testify before a Grand Jury which was investigating a conspiracy to bribe police officers to permit illegal gambling. At his administrative hearing, appellant offered no explanation to justify his failure to disclose all known information concerning this conspiracy to bribe public officers. Such action constituted employee insubordination and properly required his dismissal.

The due process requirement relied on in *Slochower* v. *Board of Education*, 350 U. S. 551 (1956), has been fully complied with. The more recent cases of *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), and *Spevack* v. *Klein*, 385 U. S. 511 (1967), are distinguishable.

Where a police commissioner obtains or is given some evidence, or apparently responsible charges are made, of wrongdoing on the part of a police officer, it would be substantially destructive of effective and honest operation of the government of a city if the police officer could, without fear of discipline, refuse to answer relevant questions.

The Fifth Amendment does not bar such questioning by a superior officer since the answers cannot be used in any criminal proceeding brought against a police officer who answers the questions. Nor should it be held to require that, when such an officer refuses to answer such questions, he must be continued in his public office despite such insubordination. If this contention is sound, it would seem that it should also be applicable to refusals to answer similar relevant inquiries by a grand jury concerning the conduct of his office or the performance of his official duties.

ARGUMENT

The provisions of Article I, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter are constitutional. Those sections require a public employee to be discharged if he refuses to sign a waiver of immunity or to answer questions before a grand jury concerning the conduct of his office and the performance of his official duties. Any such testimony would be inadmissible in a criminal prosecution of the employee. The State Constitution and the City Charter sections have been construed to limit the required waiver to one restricted to conduct of his office and his official duties and to permit discharge of the employee only after he has had a hearing at which he has an opportunity to explain his refusal.

(1)

Pertinent to a consideration of the constitutionality of Article I, § 6,[1] of the New York Constitution and New York City Charter § 1123 is a brief review of the back-

[1] Similar statutory provisions are contained in: District of Columbia, D. C. Code § 1-319 (Supp. 1958); Louisiana, La. Const. Art. 14, § 15 (P)(1), La. Rev. Stat. Ann. § 38:2128 (1950); Maryland, Md. Ann. Code, Art. 69 § 11 (1953); New Jersey, N. J. Stat. Ann. § 2A:81-17.1 (Supp. 1964).

ground and history of the Charter provision's predecessor § 903. That section was prepared by the Charter Revision Commission created by the State Legislature (L. 1934, ch. 867), and it was submitted to the people at the 1936 general election. It was adopted and became effective on January 1, 1938.

The enactment of a new charter was the outgrowth of an investigation into alleged graft and corruption in the government of New York City in the course of which numerous City employees had refused to testify as to official acts on the ground that their testimony might incriminate them. This spectacle of public employees and officers exercising their Fifth Amendment privilege brought about a realization on the part of the Joint Legislative Committee and the general public that public officers and employees should not be permitted to remain on taxpayer-supported payrolls if they invoke their privilege against self-incrimination concerning their official conduct and duties before duly empowered investigating agencies.[2] The drafters of the City Charter, in the light of these recommendations, prepared Chapter 40, including § 903, which regulates the rights and corresponding obligations of the City employees.

A similar constitutional provision, Article I, § 6, of the New York Constitution, confined in its application to public officers, was also approved by the people on November 8, 1938. This amendment also provided for the grant to the grand juries of the express power to inquire into the wilful misconduct in office of public officers, which power was never to be suspended or impaired by law. A New York City police officer is a public officer. *Canteline* v. *McClellan*, 282 N. Y. 166, 170, 25 N. E. 2d 972 (1940); *Matter of Ryan* v. *City of New York*, 228 N. Y. 16, 19, 126 N. E. 350 (1920).

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[2] *In the Matter of the Investigation of the Departments of the Government of the City of New York, Final Report by Samuel Seabury*, December 27, 1932, pp. 9-10.

(2)

The appellant argues that to dismiss him for refusing to waive immunity and testify before a grand jury constitutes a violation of his rights under the Fifth Amendment, even though any testimony would be inadmissible against him in a criminal proceeding. He relies primarily on the cases of *Slochower* v. *Board of Education*, 350 U. S. 551 (1956); *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), and *Spevack* v. *Klein*, 385 U. S. 511 (1967).

Slochower involved the summary dismissal of a teacher at a public college pursuant to § 903 of the New York City Charter (predecessor to the present § 1123), because he had refused, before a Senate Subcommittee on Internal Security, to answer questions concerning his membership in the Communist Party. The opinion of this Court first made it clear that a sinister meaning could not be imputed merely because a person exercised his right under the Fifth Amendment to refuse to testify. This Court also recognized that the problem of balancing the municipal employer's interest in the loyalty of those in its service with the traditional safeguards of individual rights was a "continuing one". 350 U. S. at p. 555. The opinion went on to say that Section 903, as interpreted and applied, operated to discharge every employee who invoked the Fifth Amendment and that the questions asked were being taken as confessed without consideration being given to such factors as the subject matter of the questions or justification for the exercise of the privilege. 350 U. S. at p. 558.

The opinion then said (pp. 558-559):

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs or

> government of the city, or * * * official conduct of city employees.' * * *
>
> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with the real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law."

The case, therefore, appears to have been decided on two grounds. One related to the nature of the inquiry at which the refusal to testify occurred, that is, a Congressional committee investigating loyalty, not the official conduct of city employees. The other emphasized the automatic discharge for exercising the Fifth Amendment privilege before an agency other than the employer—the absence of an opportunity for the employee to explain his exercise of the privilege or for the employer, before acting, to consider the circumstances of the refusal to answer.

Subsequent to *Slochower* this Court held that state statutes authorizing the dismissal of public employees who fail to answer questions relating to employment in an investigation of matters of legitimate concern to the state or agency involved do not violate due process where a hearing is held prior to such a dismissal. *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960). In each of these cases, appellants were dismissed, pursuant to a relevant statute, after a hearing before an appropriate administrative body at which time they were given the opportunity to explain their refusals to testify or to take loyalty oaths. The ultimate dismissal in each instance was based, not on the mere refusal to testify or sign a loyalty oath, but on the breach of a legitimate condition of employment that the refusal reflected.

In the *Lerner* and *Beilan* cases, it would appear that Mr. Justice Douglas, with whom Mr. Justice Black concurred, based their dissent covering both cases on the propriety of the government concerning itself with the opinions and beliefs of its employees. 357 U. S. at p. 415. The dissent, however, did recognize the right of the government to inquire into the "actions of men," such as the fitness of the public employee for his job depending on health, promptness, and record for reliability. 357 U. S. at p. 415.

Dissenting in a separate opinion in the *Lerner* case, Mr. Justice Brennan stated (357 U. S. at p. 422):

> "But can we suppose that a subway conductor would be branded a security risk if he refused to answer a question about his health? Of course the answer is no, although the question is plainly relevant to his qualifications of employment. It may well be that in such a case the State would be fully justified in discharging the employee as 'untrustworthy and unreliable.'"

Various state courts have upheld similar dismissals of police officers for refusal to testify before a Grand Jury or to sign waivers of immunity.[3]

New York City Charter, Section 903, involved in the *Slochower* case, and its successor section, Section 1123 of the City's new charter, are identical. Both, if read literally, require an automatic dismissal of an employee for refusal to testify at specified hearings or inquiries. Nevertheless, after the *Slochower* decision, the New York courts treated the section and Article I, § 6, of the New York Con-

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[3] See *Christal* v. *Police Commission*, 33 Cal. App. 2d 564, 92 P. 2d 416 (1939); *Drury* v. *Hurley*, 339 Ill. App. 33, 88 N. E. 2d 728 (1949), cert. denied, 339 U. S. 983 (1950); *Fallon* v. *New Orleans Police Department*, 238 La. 531, 115 So. 2d 844 (1959); *McAuliffe* v. *New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892); *Roche* v. *Police Commissioner*, 33 Cal. App. 2d 574, 92 P. 2d 422 (1939); *Soudler* v. *Philadelphia*, 305 Pa. 1, 156 A 245 (1931). Cf. *Scholl* v. *Bell*, 125 Ky. 750, 102 S. W. 248 (1907).

stitution as requiring a hearing before dismissal. *Matter of Conlon* v. *Murphy*, 24 A. D. 2d 737, 263 N.Y.S. 2d 360 (1965). The rule was applied in two cases decided under the title of *Matter of Gardner* v. *Murphy*, 46 Misc. 2d 728, 260 N.Y.S. 2d 739 (1965). As a result the appellant herein was given a hearing and thereafter dismissed. The companion case was reversed because of its peculiar circumstances. *Matter of Koutnik* v. *Murphy*, 25 A. D. 2d 197, 268 N.Y.S. 2d 265 (1966), app. to New York Court of Appeals pending. In the present action Chief Judge Fuld added the further element to the interpretation of the provisions, that "his testimony would be inadmissible in a criminal prosecution" (20 N Y 2d at p. 230, 229 N. E. 2d at p. 186).

In *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), it was held that answers given by police officers to questions asked them in the course of an Attorney General's investigation could not be used against them in a criminal prosecution. The answers were excluded on the ground that they were coerced confessions because the police officers were faced by a choice of either answering the questions or forfeiting their jobs by reason of a New Jersey forfeiture of office statute similar to the New York Constitution and City Charter provisions here involved. This Court did not pass on the validity of the forfeiture of office statute. It confined itself to holding that answers given under threat of its application are coerced and, therefore, cannot be used in a criminal prosecution of the police officers.

In the companion case of *Spevack* v. *Klein*, 385 U. S. 511 (1967), this Court held that a lawyer cannot be disbarred because he invoked the Fifth Amendment as the ground for refusing to honor a subpoena to produce financial records and for refusing to answer questions relevant to charges of misconduct in carrying on his law practice. It said that the threat of disbarment was a powerful form of compulsion to make a lawyer relinquish the Fifth Amendment privilege.

Mr. Justice DOUGLAS, who spoke for the majority in both the *Garrity* and *Spevack* cases, wrote the following footnote in the *Spevack* opinion (385 U. S. at p. 516):

> "3. Whether a policeman, who invoked the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we did not reach."

Mr. Justice FORTAS, in his concurring opinion in that case, said (385 U. S. at p. 519):

> "But I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."

The quoted reservations apparently apply to an automatic discharge of a police officer for refusing to testify. Here the dismissal was not automatic. At the hearing granted appellant subsequent to his refusal to waive immunity, he failed to offer any explanation for such refusal.

(3)

The *Garrity* case, in any event, would appear to remove any basis for a refusal by a police officer to answer questions concerning his official duties when questioned either by the Police Commissioner or before a grand jury even though *Garrity* had not been decided at the time petitioner appeared before the grand jury or at the time of his disciplinary hearing. That case establishes that his answers may not be used against him in a criminal proceeding.

Obviously this ruling would also extend to any evidence discovered as a result of his answers.

In view of the unavailability of the answers for use in any criminal proceeding, the Fifth Amendment should not be extended to bar questioning of police officers to obtain information concerning crime or to determine whether they have been guilty of misconduct in performing their official duties. It is true that the immunity obtained as a result of giving answers when so questioned is not given with the formality of a specific grant of immunity and that the scope of the immunity is not so broad as that given under such a grant. The immunity, however, would appear to be broad enough to satisfy Fifth Amendment requirements since it extends to the answers and the fruits of the answers. In *Murphy* v. *Waterfront Commission of New York*, 378 U. S. 52, 79 (1964), this Court held that a similar immunity with regard to federal prosecution, limited to compelled testimony and its fruits, satisfied the requirements of the Fifth Amendment.

(4)

Steinberg v. *United States*, 141 Ct. Cl. 1, 163 F. Supp. 590 (1958), relied on by appellant, held that a statute which *automatically* revoked a federal pension as of the date that the pensioner refused to testify before a grand jury, federal court or congressional committee was invalid. The Court relied on the *Slochower* case.

Appellant also relies on *United States* v. *Lovett*, 328 U. S. 303 (1946). In *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), this Court distinguished a statute, analogous to the sections here involved, from the Congressional Act found unconstitutional in the *Lovett* case, stating (p. 723):

> "Unlike the provisions of the [Los Angeles] Charter and ordinance under which petitioners were removed the statute in the *Lovett* case did not declare general

and prospective operative standards of qualification and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees. Under these circumstances, viewed against the legislative background, the statute was held to have imposed penalties without judicial trial."

It is evident from an examination of Article I, § 6, of the New York Constitution and § 1123 of the New York City Charter that the sections were not directed at any individuals specified by name as in the *Lovett* case.

(5)

A police commissioner has a right to question members of his force with regard to the performance of their official duties to determine their fitness for office or with regard to information they have obtained concerning crimes. If a police officer may not be removed because he refuses to answer questions about his official duties, asserting his privilege under the Fifth Amendment even though his answers cannot be used against him in a criminal proceeding, it would mean that such a refusal to answer questions put to him by the Police Commissioner also could not furnish a basis for his removal. The Police Commissioner, having appointed the appellant to his position of public trust and civic responsibility, could not inquire into the performance of his official duties after the Commissioner obtains information indicating improprieties on his part or after accusations are made concerning his integrity.

Such a limitation on a police commissioner's power to interrogate members of his force would deprive superiors and official bodies of a power essential to the maintenance of a viable government, municipal, state or federal. It would mean that police officers, men who are appointed to enforce the laws and who are, in a position

to gain ready access to homes and business establishments, may refuse to answer accusations or even evidence that they have been faithless in performing their duties. And it would mean that they may continue to act as police officers until and unless evidence can be obtained clearly showing that they have violated their duty.

A few examples of situations which have arisen or are likely to arise illustrate how difficult, if not impossible, it would be to operate a city effectively and honestly if police officers or other employees could refuse, with impunity, to answer questions concerning suspicious circumstances in which they are involved: A citizen reports that he has seen a specific policeman enter various bars and grills, speak in a whisper to the owner and receive money from the owner. A paper is found in a police officer's lost memorandum book on which there is a list of various businesses in his precinct and amounts alongside the names of these businesses, strongly indicating that Christmas gifts were being improperly solicited by him. An Assistant Corporation Counsel fails to call to the witness stand someone who, it appears, would have been a key witness for the City in the defense of the action. Shortly after a building inspector examines a building in a slum area and reports that there are no building violations, his superior inspects the building and discovers several, readily observable, life-endangering violations. Innumerable analogous examples could be cited.

In these examples the evidence available to the Commissioner, standing alone, is not ordinarily sufficient to justify the dismissal of the police officer or other employees who, under New York law, may not be dismissed without a hearing on charges supported by substantial evidence. Under these circumstances it seems eminently proper for the Commissioner to question the public employee concerning the matter. A refusal to answer pertinent questions constitutes insubordination and lack of candor. It is this insubordination and lack of candor that

justify dismissal. *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960).

If such a refusal to answer a question by the Police Commissioner can furnish a basis for his removal, there would appear to be no sound reason for holding that the refusal to answer questions put to a police officer concerning the performance of his official duties or his knowledge of crimes learned in the performance of such duties by any other body authorized to examine into such matters, improper conduct or malfeasance or crimes, does not furnish a basis for removal.

It should be recalled that the Grand Jury investigation was concerned with a conspiracy to bribe police officers to permit illegal gambling operations, that the appellant was advised of the nature of the investigation and that he was requested to sign a limited waiver of immunity so that he could be questioned without obtaining immunity. The waiver was limited to matters "concerning the conduct of my office on the performance of my official duties".

Appellant, as a police officer, had a duty to furnish the appropriate authorities with information pertinent to his employment and his knowledge concerning crimes. This is especially significant where the conduct in question relates to the administration of justice and his part in maintaining or failing to maintain the integrity of the Police Department. His refusal to sign a limited waiver of immunity in this investigation so that he could be questioned without obtaining immunity concerning the bribery of police officers and his failure, at his hearing, to give reasons for his refusal are inconsistent with his duty as a police officer. Having breached his duty, appellant was properly dismissed.

Particularly apt is the following statement in *Scholl* v. *Bell*, 125 Ky. 750, 102 S. W. 248, 261-262 (1907):

"Here were police officers being interrogated as to existence of crimes they were paid to prevent, if

possible; if not, to expose and punish afterwards; and yet they one and all refused to answer 'under advice of counsel.' Suppose a secret murder had been committed, and the police officer on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him?"

(6)

Appellant also argues that he was illegally subpoenaed before the Grand Jury and attempts to make this an equal protection of the law issue (App. Brief, pp. 11-13). This argument was not made in the New York courts. Nor was it mentioned in the Jurisdictional Statement.

In the New York courts the appellant merely argued that a target of an inquiry may not be brought before a grand jury by subpoena. No mention of equal protection was advanced in relation to this argument. Appellant merely relied on New York cases which did not discuss any equal protection issue.

While in his Jurisdictional Statement, although not in the "Question Presented," appellant did argue equal protection, that argument was limited to the issue of burden of proof of misconduct. Appellant contended that other public employees may be removed only where the department bringing the charges sustains the burden of proof of misconduct, while those in the position of the appellant are, in effect, required to sustain the burden of proof that they were not guilty of misconduct. Such an equal protection issue obviously is different from appellant's present argument that equal protection is denied by requiring a public officer to appear before a grand jury

pursuant to subpoena even though he is a target of the investigation while others who are targets of an investigation may not be subpoenaed.

Moreover, with regard to equal protection, it is reasonable and proper to draw a distinction between public employees and other persons who are targets. They have a special responsibility to the community which justifies such inquiry.

There are additional reasons barring the presentation of the equal protection argument to this Court. The petition in the New York Supreme Court instituting this proceeding alleges in general terms that there has been a denial of equal protection of the laws (Par. "Sixth", R. 4). The issue, however, was not presented to the New York Appellate Division or to the Court of Appeals. Furthermore, there is not the slightest indication that the New York courts ever considered the issue. It would appear, therefore, that it cannot be raised on this appeal. *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. 341, 343-344 (1920); *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 433-434 (1940); *Wilson* v. *Cook*, 327 U. S. 474, 483-484 (1946). Moreover, the reference in the petition to equal protection of the laws does not specifically refer to the United States Constitution and makes it clear that appellant is not relying on an equal protection clause in Article I, § 11, of the New York Constitution. *Kansas Endowment Asso.* v. *Kansas*, 120 U. S. 103, 104 (1887).

In any event, the appellant's equal protection argument lacks merit. It appears to assume that we are dealing with a case where the police officer has testified before a grand jury and that such testimony is being used as the basis for a dismissal. That is not what occurred in the present case. At the least, the argument assumes that the New York Court of Appeals has held that the burden of proof of misconduct, which ordinarily is on the party seeking to have a police officer dismissed, is on the appellant in the present case.

All that the New York Court of Appeals held, however, is that a police officer who has refused to furnish information to a grand jury regarding the conduct of his office and the performance of his official duties may be discharged unless, at his disciplinary hearing, he offers an appropriate explanation for such refusal. This holding applies to all police officers. Even if it varies from the rule applicable under other circumstances, it is reasonable; and it is not discriminatory because of its uniform application to all police officers pursuant to the New York Constitution and the New York City Charter, as interpreted since the *Slochower* decision.

CONCLUSION

The appeal to this Court from the judgment of the New York Court of Appeals should be affirmed.

April 11, 1968.

Respectfully submitted,

J. Lee Rankin,
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Municipal Building,
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Norman Redlich,
Stanley Buchsbaum,
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of Counsel.

APPENDIX

Waiver of Immunity (Department's Exhibit 4).

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE, ET AL.

I, , residing at
occupying the office of
in the of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment prosecution and punishment for or on account of, regarding or relating to any matter, transaction or things, concerning the conduct of my office on the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence documentary or otherwise, before the Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury:

Dated: New York, N. Y.

Witness:

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this day of , 196 , before me personally appeared , to me personally known and known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

SUPREME COURT, U. S.

APR 19 19

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 635

ROBERT VINCENT GARDNER,

Appellant,

—v.—

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

RONALD PODOLSKY
Attorney for Appellant
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New York, New York 10038

IN THE

Supreme Court of the United States

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ROBERT VINCENT GARDNER,

Appellant,

—v.—

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

Appellant's refusal to waive immunity was justified at the Departmental Hearing by the evidence introduced; the Appellees contemplated use of compelled testimony in criminal proceedings; equal protection of the laws was urged below; the state requirements of continued public office are unconstitutional.

The "Question Presented for Review" as set forth in the Appellees' Brief on page 2 contains two unwarranted assumptions. The first is that the Appellant failed to offer any explanation of his refusal to waive immunity; the second is that at the time and place of this case it was the Appellees' presumption that the testimony adduced could not

and would not be used against Appellant in subsequent criminal proceedings. Appellant did offer explanation of his refusal to waive immunity. He stated at the Grand Jury hearing that since he was a target of the investigation there was no authority to question him (A21). This explanation was in evidence when the District Attorney at the Disciplinary Hearing testified and paraphrased Appellant's explanation, and the minutes of the Grand Jury Hearing were also introduced by the prosecution into evidence (A29). This reason was reasserted by Appellant's Counsel in his motion to dismiss, stating that Appellant's appearance before the Grand Jury was illegal and all consequences flowing therefrom were similarly illegal, in that there was no authority on the Part of the Grand Jury to subpoena and examine a target of investigation, citing *People* v. *Steuding*, 6 N. Y. 2d 214, 160 N. E. 2d 468 (A32). At his Disciplinary Hearing the Appellant did not refuse to testify since he was not requested to by the prosecution. His justification for refusal to waive immunity was an adequate one already in evidence before the Commissioner, and this reason, together with the fact that the requirements of the statutes under review are unconstitutional and fall of their own weight, satisfied Appellant's defense needs. Thus the statement on page 5 of appellees' brief under the heading "Appellant's Case" that Appellant did not offer any evidence on his behalf or offer any explanation of his refusal to sign a waiver of immunity, is incorrect. The two paragraphs above that statement in Appellees' Brief set forth Appellant's explanation. The fact that Appellant chose to rest on the Department's case and not testify was consistent with the statutes and cases cited in Appellant's brief which hold that he was not required to do so.

The assumption that under the circumstances of the case the evidence adduced at the Grand Jury hearing could not and would not have been used against him in subsequent criminal proceedings is without merit. The proceedings took place before *Garrity* v. *New Jersey,* 385 U. S. 493. The investigation was not an administrative disciplinary hearing but an announced criminal investigation (A20). The intention to use the information gained therein in a criminal prosecution is sustained by that announced purpose of the hearing, together with the wording of the proposed waiver of immunity (Appellees' Brief, Appendix p. 23), and the fact that the statutes pursuant to which Appellant was requested to sign the waiver are cast in terms of and contemplate criminal prosecution. In fact it was not until the Court of Appeals decision in this case that any suggestion by anyone was made that there was never any real purpose other than administrative use of the testimony. Article I, Section 6 of the *New York Constitution* contains the proviso excepting public officers, which proviso by its terms is specifically attached to the privilege against self-incrimination in any criminal case. If this section is being relied upon as justification for Appellant's dismissal and it is assumed by Appellees that the Grand Jury investigation was not a criminal case, then the proviso requirement to waive immunity would not apply under the terms of the Article as written. The proviso relates only to criminal cases.

The Appellees in their Brief mostly rely on cases which antedate *Malloy* v. *Hogan,* 378 U. S. 1, and which were decided at a time when it was believed that the Fifth Amend-

ment of the *United States Constitution* did not apply to the states through the Fourteenth. They cite footnote "3" to Mr. Justice Douglas' opinion in *Spevack* v. *Klein,* 385 U. S. 551,516, and the concurring opinion of Mr. Justice Fortas at 385 U. S. 551, 519, both of which refer to failure to testify at disciplinary hearings. Reliance on these observations is not well placed for two reasons: The refusal to testify in this case was not at a Disciplinary hearing by the Department but rather at a Criminal hearing by a Grand Jury without power to discipline; and the refusal of a public officer to testify at his own removal hearing is authorized by statute and case law of New York cited in Appellant's Brief. *Laws 1940,* Ch. 834; *Civil Service Law* §75; *Schawecker* v. *Green,* 96 App. Div. 249, 89 N. Y. S. 343.

Appellees' suggestion on page 20 of their brief that the issue of Equal Protection of the Laws and illegal appearance before the Grand Jury was not before the New York Courts or this Court is without merit. The Petition, equivalent to a complaint and hence a pleading, in paragraph "Sixth" alleged that Appellant's dismissal was a denial of equal protection of the Laws (A4). The Answer and Return served by Appellees set forth the basis of the dismissal, including the exhibits setting forth the Grand Jury Appearances and the Departmental hearing, wherein the illegal appearance was alleged (A21, A28, A29, A32). The Reply of Appellant alleged the dismissal was contrary to the Constitution of the United States. Thus the equal protection of the laws issue was raised in the pleadings which frame the issues. These pleadings were before all courts below and the issue of illegal appearance was presented in the briefs, citing *People* v. *Steuding, supra,* and *Matter of Bernoff* v. *Amoroso,* 188 Misc. 845, aff'd 271 App. Div. 925, 65

N. Y. S. 2d 810, aff'd 67 N. Y. S. 2d 701. Confirmation of the fact that these cases were urged below can be found in the official report of this case under "Points of Counsel", 20 N. Y. 2d 277. The issue was also before this Court during its determination of the motion by Appellees to dismiss or affirm. See: Brief Opposing Motion to Dismiss or Affirm submitted by the Appellant. Any denial of equal protection of the laws by a state is illegal conduct under the Fourteenth Amendment of the United States Constitution.

The difficulties of solving cases of wrongdoing by public officers envisioned by the hypothetical cases on page 18 of Appellees' Brief are no more severe than solving cases of wrongdoing on the part of any other person in our society. The privilege against self-incrimination belongs to all citizens and the fact that one of them is a public officer does not make any more difficult the solving of crime. The answer is not in weakening constitutional liberty but is in strengthening the skill, efficiency and techniques in the gathering of extrinsic evidence. Nor is the need for discipline particularly weakened by the privilege. Even the Armed Forces of the United States recognize that the need for extreme discipline involving the security of the nation can co-exist compatibly with constitutional liberties including the privilege against self-incrimination. See; *Uniform Code of Military Justice,* Article 31.

CONCLUSION

The state requirements of continued public office are unconstitutional and the Appellant should be restored, as he has never been found guilty of any justiciable act of misconduct.

Respectfully submitted,

RONALD PODOLSKY
Attorney for Appellant

April, 1968

APPENDIX

Uniform Code of Military Justice (1950).

Public Law 506, 81st Congress, Ch. 169, 2d Session; *Uniform Code of Military Justice, Article* 31, states:

(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person, subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this code shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial.

SUPREME COURT OF THE UNITED STATES

No. 635.—October Term, 1967.

Robert Vincent Gardner, Appellant, *v.* Vincent L. Broderick, as Police Commissioner of the City of New York, et al.	On Appeal From the Court of Appeals of New York.

[June 10, 1968.]

Mr. Justice Fortas delivered the opinion of the Court.

Appellant brought this action in the Supreme Court of the State of New York seeking reinstatement as a New York City patrolman and back pay. He claimed he was unlawfully dismissed because he refused to waive his privilege against self-incrimination. In August 1965, pursuant to subpoena, appellant appeared before a New York County grand jury which was investigating alleged bribery and corruption of police officers in connection with unlawful gambling operations. He was advised that the grand jury proposed to examine him concerning the performance of his official duties. He was advised of his privilege against self-incrimination,[1] but he was asked to sign a "waiver of immunity" after being told that he would be fired if he did not sign.[2] Following

[1] The Assistant District Attorney said to appellant:

"You understand . . . that under the Constitution of the United States as well as the Constitution of New York, no one can be compelled to testify against himself, and that he has a right, the absolute right to refuse to answer any questions that would tend to incriminate him?"

[2] Appellant was told:

"You understand . . . that under the Constitution of New York, as well as the Charter of the City of New York, that a public officer, which includes a police officer, when called before a Grand

his refusal, he was given an administrative hearing and was discharged solely for this refusal, pursuant to § 1123 of the New York City Charter.[3]

Jury to answer questions concerning the conduct of his public office and the performance of his duties is required to sign a waiver of immunity if he wishes to retain that public office?"

The document appellant was asked to sign was phrased as follows:

"I . . . do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution, and punishment for or on account of, regarding or relating to any matter, transaction or things, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence documentary or otherwise, before the [blank] Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury."

[3] That section provides:

"If any councilman or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Section 6 of Article I of the New York Constitution provides:

"No person shall be . . . compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign

The New York Supreme Court dismissed his petition, 27 A. D. 2d 800, 279 N. Y. S. 2d 150 (1967), and the New York Court of Appeals affirmed. 20 N. Y. 2d 227, 229 N. E. 2d 184 (1967). We noted probable jurisdiction. — U. S. — (1968).

Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result may be self-incriminatory, and the need fully to implement its guaranty. See *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Counselman* v. *Hitchcock*, 142 U. S. 547, 585–586 (1892); *Albertson* v. *SACB*, 382 U. S. 70, 80 (1965). The privilege is applicable to state as well as federal proceedings. *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Murphy* v. *The Waterfront Commission*, 378 U. S. 52 (1964). The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made. Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying. *Counselman* v. *Hitchcock*, *supra*, at 585–586; *Murphy* v. *The Waterfront Commission*, *supra*, at 79.

The question presented in the present case is whether a policeman who refuses to waive the protections which the privilege gives him may be dismissed from office because of that refusal.

About a year and a half after New York City discharged petitioner for his refusal to waive this immunity, we decided *Garrity* v. *New Jersey*, 385 U. S. 493 (1967). In that case, we held that when a policeman had been

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a waiver if immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

compelled to testify by the threat that otherwise he would be removed from office, the testimony that he gave could not be used against him in a subsequent prosecution. Garrity had not signed a waiver of immunity and no immunity statute was applicable in the circumstances. Our holding was summarized in the following statement (at 500):

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

The New York Court of Appeals considered that *Garrity* did not control the present case. It is true that *Garrity* related to the attempted use of compelled testimony. It did not involve the precise question which is presented here: namely, whether a State may discharge an officer for refusing to waive a right which the Constitution guarantees to him. The New York Court of Appeals also distinguished our post-*Garrity* decision in *Spevack* v. *Klein*, *supra*. In *Spevack*, we ruled that a lawyer could not be disbarred solely because he refused to testify at a disciplinary proceeding on the ground that his testimony would tend to incriminate him. The Court of Appeals concluded that *Spevack* does not control the present case because different considerations apply in the case of a public official such as a policeman. A lawyer, it stated, although licensed by the state is not an employee. This distinction is now urged upon us. It is argued that although a lawyer could not constitutionally be confronted with Hobson's choice between self-incrimination and forfeiting his means of livelihood, the same principle should not protect a policeman. Unlike the

lawyer, he is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other "client" or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer. Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no one.[4]

We agree that these factors differentiate the situations. If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties,[5] without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *New Jersey*, *supra*, the privilege against self-incrimination would not have been a bar to his dismissal.

The facts of this case, however, do not present this issue. Here, petitioner was summoned to testify before a grand jury in an investigation of alleged criminal conduct. He was discharged from office not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination. The Constitution of New York State and the City Charter both expressly provided that his failure to do so, as well as his failure to testify, would result in dismissal from his job. He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege. *Garrity* v. *New Jersey*, *supra*.

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[4] Cf. *Spevack* v. *Klein*, *supra*, at 519–520 (concurring opinion).

[5] The statements in my concurring opinion in *Spevack* v. *Klein*, *supra*, at 519–520, to which the New York Court of Appeals referred, are expressly limited to situations of this kind.

We need not speculate whether, if appellant had executed the waiver of immunity in the circumstances, the effect of our subsequent decision in *Garrity* v. *New Jersey, supra,* would have been to nullify the effect of the waiver. New York City discharged him for refusal to execute a document purporting to waive his constitutional rights and to permit prosecution of himself on the basis of his compelled testimony. Petitioner could not have assumed—and certainly he was not required to assume—that he was being asked to do an idle act of no legal effect. In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment. It is clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to seek to compel petitioner to waive his immunity.

Proper regard for the history and meaning of the privilege against self-incrimination,[6] applicable to the States under our decision in *Malloy* v. *Hogan,* 378 U. S. 1 (1964), and for the decisions of this Court,[7] dictate the conclusion that the provision of the New York City Charter pursuant to which petitioner was dismissed cannot stand. Accordingly, the judgment is

Reversed.

MR. JUSTICE BLACK concurs in the result.

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[6] See *Miranda* v. *Arizona,* 384 U. S. 436, 458–466 (1966), and authorities cited therein.

[7] See, *e. g., Griffin* v. *California,* 380 U. S. 609 (1965); *Malloy* v. *Hogan, supra.*

SUPREME COURT OF THE UNITED STATES

Nos. 635 AND 823.—OCTOBER TERM, 1967.

Robert Vincent Gardner, Appellant, 635 *v.* Vincent L. Broderick, as Police Commissioner of the City of New York, et al.	On Appeal From the Court of Appeals of New York.
Uniformed Sanitation Men Association, Inc., et al., Petitioners, 823 *v.* Commissioner of Sanitation of the City of New York et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 10, 1968.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in the result.

Given in combination the decisions in *Spevack* v. *Klein*, 385 U. S. 511, and *Garrity* v. *New Jersey*, 385 U. S. 493, I can find no solidly acceptable course for me to take in these cases other than to concur in the judgments rendered by the Court. I do so with a good deal less reluctance than would otherwise have been the case because, despite the distinctions which are sought to be drawn between these two cases, on the one hand, and *Spevack* and *Garrity*, on the other, I find in these opinions a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. I add only that this is a welcome breakthrough in what *Spevack* and *Garrity* might otherwise have been thought to portend.

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 635

ROBERT VINCENT GARDNER,

Appellant,

—v.—

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT FILED SEPTEMBER 19, 1967
PROBABLE JURISDICTION NOTED JANUARY 29, 1968

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 635

ROBERT VINCENT GARDNER,

Appellant,

—v.—

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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September 30, 1965	Index Number Assigned. [Petition Filed].
October 26, 1966	Order Special I Transfer to Appellate Division.
February 24, 1967	Notice of Appeal. [To Court of Appeals]
May 2, 1967	Judgment MF 10330. Costs.
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August 1, 1967	Notice of Appeal to Supreme Court of U. S.
August 17, 1967	Opinion of Court of Appeals. [Filed]

NOTE: Matter in brackets added to clarify docket entries which are set forth as they appear in the docket.

—1—

Notice of Petition

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index 15178—65

In the Matter of the application of

ROBERT VINCENT GARDNER,

Petitioner,

For an Order Pursuant to Article 78, CPLR,

—against—

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Respondents.

SIRS:

PLEASE TAKE NOTICE that upon the annexed verified Petition of ROBERT VINCENT GARDNER, duly executed the 30th day of September, 1965, and upon all the proceedings heretofore had herein the undersigned will make an application to this Court at a Special Term Part I thereof at the Courthouse, 60 Centre Street, New York, New York, on the 26th day of October, 1965 at 9:30 A.M. or so soon thereafter as counsel can be heard for a judgment granting reinstate-

ment of the Petitioner as Patrolman in the New York City Police Department with full back pay, pursuant to Article 78, CPLR, New York County designated as the place of hearing in that Respondents made the determinations complained of in New York County.

PLEASE TAKE FURTHER NOTICE that your Answer & Return must be served at least five (5) days before the return date hereof.

Dated: New York, N. Y., September 30, 1965.

(Endorsements omitted)

• • • • • • •

—3—

Verified Petition

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

To the Supreme Court of the State of New York:

ROBERT VINCENT GARDNER, being duly sworn, as and for his petition herein respectfully shows this Court:

First: That he is forty-one years of age and was duly appointed to the Police Department of the City of New York after competitive examination on October 1, 1949.

Second: That he is an honorably discharged veteran of the United States Navy having served therein during war-

Third: That on August 11, 1965 your petitioner was dismissed by the Respondents herein from his position effective August 6, 1965.

Fourth: That such dismissal was arbitrary, capricious and unreasonable and illegal, in that he was not afforded a proper hearing as required by the statutes of the State of New York and the Rules and Procedures of the Police Department of the City of New York.

Fifth: That by virtue of the foregoing your petitioner has been deprived of his pay from August 6, 1965 without authority.

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Sixth: That on August 10, 1964, certain proceedings took place in the Police Department which purported to be a hearing concerning an allegation that your petitioner had failed or refused to waive immunity before the Grand Jury of New York County, the transcript of which has not as yet been made available to your petitioner, and which purported hearing was not authorized by law or departmental rules, and the employment of which device deprived your petitioner of equal protection of the laws and deprivation of property without due process of law.

Seventh: That the Respondent's Answer & Return herein will show that such hearing was without legal authority and that substantively the decision of the Respondents were arbitrary, capricious and unreasonable and without substantial evidence to support the findings.

Eighth: That Petitioner demanded that all pending charges be tried together under proper departmental Rules & Procedures, which demand was refused to the prejudice

of the Petitioner, and was in direct violation of the Departmental Rules & Procedures guarantee of a speedy trial.

WHEREFORE your Petitioner prays for an Order directing the Respondents to restore Petitioner to his position as Patrolman with full back pay and such other relief as to the Court may seem just and proper.

/s/ ROBERT V. GARDNER

(Verification omitted in printing)

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Answer and Return

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

To the Supreme Court of the State of New York:

The Answer and Return of the above-named respondents respectfully shown to this Court, makes the following allegations:

1. Deny each and every allegation contained in paragraphs of the petition designated "Fourth", "Fifth" and "Seventh".

2. Deny each and every allegation contained in paragraph of the petition designated "Sixth", except admit

that a hearing was held at Police Headquarters pursuant to notice, on the charge that the petitioner refused to waive immunity before the Grand Jury of New York County.

3. Deny each and every allegation contained in paragraph of the petition designated "Eighth", except admit that petitioner demanded that all pending charges be tried together.

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As and for a First Defense, Respondents Affirmatively Allege:

4. Section 2/36.6 of the Amendments of the Rules and Procedures of the Police Department of the City of New York provides as follows:

"2/36/6 The following are applicable to members of the force:

"Article 1, Section 6 of the New York State Constitution provides in part:

. . . any public officer, who, upon being called before a Grand Jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such Grand Jury, shall by virtue of such refusal, be disqualified from holding any other public office or employment for a period of 5 years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general

(G.O. 17, s. 1965)"

5. Section 1123 of the Charter of the City of New York provides the following:

"If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully

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refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

(G.O. 17, s. 1965)"

6. By letter dated August 6, 1965, the Police Commissioner at that time, Vincent L. Broderick, was advised by the Office of the District Attorney, New York County, that petitioner refused to sign a limited waiver of immunity from prosecution before the Grand Jury, New York County in connection with a pending investigation, as required under the provisions of said Article I, Section 6 of the Constitution of the State of New York, and Section 1123

of the Charter of the City of New York. A copy of said letter, and a copy of the official transcript of the testimony taken before the Grand Jury, are annexed hereto and Marked Schedule "A" and "B" respectively.

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7. On the same date as aforementioned, petitioner was served with a Notice of Hearing, which directed him to appear before a Trial Commissioner in the Board Room of Police Headquarters, 240 Centre Street, New York, N.Y., on the 10th day of August, 1965, to show cause why his employment, as a member of the Police Department, should not be "terminated" and his office "vacated", as prescribed by the provisions of law heretofore quoted herein. A copy of said notice is annexed hereto, and marked Schedule "C".

8. On the 10th day of August, 1965, and at the time and place stated in the aforesaid Notice, the petitioner duly appeared with counsel representing him, before Hon. Leonard E. Reisman, then Deputy Commissioner in charge of Legal Matters of the Police Department of the City of New York, who had been duly authorized. This matter was tried, heard, publicly examined into, and investigated in the manner required by law, in accordance with the Rules and Procedures of the Police Department, and full opportunity was given to petitioner to be heard in his own defense. A copy of the transcript of said proceedings is annexed hereto, and marked Schedule "D".

9. After the trial, hearing, and investigation were terminated, the charge and specification, testimony taken, and proceedings had, were duly considered by the aforesaid Trial Commissioner, who determined thereafter, in the

—11—

exercise of his best judgment and discretion, that the peti-

tioner was guilty of said charge. He thereupon recommended that the petitioner's office be vacated and his services terminated by operation of law. A copy of said report, dated August 11, 1965, with findings and recommendation, is annexed hereto, and marked Schedule "E".

10. On the same date, said findings and recommendation were referred for final determination to the respondent, Police Commissioner of the City of New York, who was at that time, Hon. Vincent L. Broderick.

11. After an inquiry and consultation with Hon. Leonard E. Reisman, then Deputy Commissioner, said charge and specification, findings and recommendation were duly considered by the said Police Commissioner at that time.

12. After having approved of the aforesaid findings and recommendation of the Deputy Commissioner, the Police Commissioner caused an order to be made and entered, declaring, ordering and adjudging that the petitioner was guilty of the said charge, more particularly set forth in said order, and ordering the petitioner's office to be vacated, effective August 6, 1965, and his employment, in the Police Department of the City of New York, terminated, by operation of law. A copy of the aforementioned order (of which notice was given in Special Orders No. 196 for

the year 1965) is annexed hereto, and marked Schedule "F".

13. On August 11, 1966, petitioner was notified by Louis L. Stutman, Chief Clerk of the Police Department, of the action taken by the Police Commissioner in terminating

his employment and vacating his office. A copy of said notice is annexed hereto, and marked Schedule "G".

14. An extract from the Amendments to the Rules and Procedures of the Police Department of the City of New York, in force at the time of the commission of the offense charged, and applicable to the case of the petitioner, is annexed hereto, and marked Schedule "H".

15. This Answer and the Schedules annexed hereto contain, as directed by statute, all proceedings had herein by the Police Commissioner of the City of New York.

16. The termination of petitioner's services in the Police Department of the City of New York, was, in all respects, legal and proper, and effected in conformity with, and in full compliance with the Constitution and the Laws of the City and State of New York.

17. Petitioner was afforded all of the rights and protections of the provisions of the Constitution of the State of New York, the Civil Service Law, the Administrative Code of the City of New York, the Rules and Regulations

of the City Civil Service Commission, and the Rules and Procedures of the Police Department of the City of New York.

18. Petitioner was afforded the opportunity of a hearing, the right of representation by counsel, the right of confrontation, and all of the rights and privileges which constitute due process of law.

19. The determination of the Police Commissioner at that time, terminating the petitioner's services in said De-

partment, was founded upon good and sufficient reasons, and therefore was not arbitrary, capricious, unreasonable or illegal, as alleged.

WHEREFORE, respondents pray for a judgment denying the application and dismissing the petition, with costs.

(Endorsement and verification omitted.)

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Schedule "A"

(N.Y. District Attorney Letterhead)

August 6, 1965

Honorable Vincent L. Broderick
Police Commissioner
Police Headquarters
240 Centre Street
New York, New York

Dear Commissioner Broderick:

Please be advised that the following member of the Police Department, Patrolman Robert V. Gardner, Shield No. 18984, assigned to the 5th Precinct, upon appearing before the Second August, 1965 Grand Jury of the County of New York, pursuant to the service of a grand jury subpoena issued in connection with an investigation to determine whether there has been in existence a conspiracy to commit the crimes of bribery of a public officer in relation to violations of the gambling laws of the State of New York, refused to sign a limited waiver of immunity as required under the Constitution of the State of New York and the Charter of the City of New York. As you

undoubtedly know by refusing to sign such waiver, he refused to be questioned about matters relating to his official conduct.

Since it was not the intention of the District Attorney to request the Grand Jury to confer immunity upon him, he was not questioned.

Very truly yours,

/s/ PETER D. ANDREOLI
Peter D. Andreoli
Assistant District Attorney

PDA: jmg

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Schedule "B"

SUPREME COURT
OF THE STATE OF NEW YORK

GRAND JURY OF THE COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

vs.

JOHN DOE *et al.*,

New York, N.Y., August 5, 1965

Before:

A QUORUM OF THE SECOND AUGUST 1965 GRAND JURY
Presented by: PETER D. ANDREOLI, Esq., PETER KOSTE, Esq., Assistant District Attorneys

ALFRED PIEKARSY, EDWIN MARTINEZ, Grand Jury Reporters

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ROBERT VINCENT GARDNER, Patrolman, Police Department of the City of New York, appeared as a witness, but was not sworn, stated as follows:

By Mr. Andreoli:

Mr. Andreoli: Let the record show that we are not requesting the witness to be sworn at this time.

Q. What is your name, shield and assignment? A. Robert Vincent Gardner, shield 18984, assigned to the 5th Precinct.

Q. Now, Patrolman Gardner, this Grand Jury is conducting an investigation to determine whether or not there has been a conspiracy, in existence, between various members of the Police Department and various gamblers throughout the County of New York to bribe public officers, namely, police officers, for the purpose of permitting these gamblers to operate illegally and unlawfully in the County of New York, without police interference. You understand the nature of the— A. Yes.

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Q. —of this inquiry? A. I understand.

Q. Isn't it a fact, Mr. Gardner, I think this has been explained to you on prior occasions; is that not so? A. Well, the prior occasion was very brief and I didn't absorb.

Q. We will go over it again, but on June 25, 1964, I believe '65, this was explained to you; is that correct? A. Briefly.

Q. '64, but in any event, at that time, as far back as 1964, June, you were aware of this inquiry; is that correct? A. Yes.

Q. Now, let—I'll explain it to you again, sir. Now, do you fully understand the nature of the inquiry? A. Yes.

Q. I see. Now, you understand that under the Constitution of the United States, as well as the Constitution of the State of New York, no person can be compelled to give testimony against himself, that is testimony that would incriminate him, he has the right, absolute right to

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refuse to answer any question which would tend to incriminate you. You understand this; is that correct? A. I understand.

Q. You understand also, sir, that under the Constitution of the State of New York and the City Charter, as well, that public officer, police officer, or anyone else holding public office, who wishes to retain that position, is required, by law, when called before a Grand Jury and asked questions concerning the conduct of his public office or the performance of his official duties or the way he dealt with official records, anything concerning the performance of that duty, that he must sign a waiver of immunity, otherwise he may forfeit his position; do you understand that? A. Yes, you explain that.

Q. That was all explained to you. Now, do you have an attorney Mr.—Patrolman Gardner? A. Yes, as I explained to you, outside, he's not present at this time, and I would respectfully request the waiver so that my attorney and I can both review it and then come to a conclusion.

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Q. Let's get the record clear then, you were first called before the Grand Jury on June 25, 1964; some ten days later, you employed an attorney; is that correct? A. Approximately.

Q. What is the name of the attorney you then employed? A. Mr. Padowski.

Q. And did Mr. Padowski, continue to represent you in this matter from that time on? A. In the Police Department matter, article 78.

Q. And he has represented you in matters relating to this inquiry; isn't that correct? A. Not particularly this inquiry. This is the first occasion on this here inquiry.

Q. Yes, then you were served with a subpoena in this matter to appear before a Grand Jury on June 29th was it, of this year; isn't that correct? A. Yes.

Q. And you, at that time, the matter was further adjourned to July 29th; isn't that correct? A. Yes.

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Q. And you had an attorney, again? A. Yes, on both occasions.

Q. And then it was subsequently adjourned to this day? A. Yes.

Q. That's correct; so that you have been aware of the fact that you were being called upon to appear before this Grand Jury in this inquiry? A. Yes.

Q. For sometime; is that correct? A. In reference to the waiver here, my attorney or I, have never seen the waiver, only down here.

Q. The point is, you have had all this notice; is that correct? A. But not to review the waiver.

Q. I see. And your attorney is not here this morning? A. No, sir.

Q. You know he hadn't called the District Attorney's Office? A. Well, you informed me of that, that he hadn't called you.

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Q. Is that correct? A. You informed me that he hadn't called you.

Q. Well, did he tell you he was going to call this office? A. No, he didn't say.

Q. Did he tell you he had called this office? A. No, he did not.

Q. Now, what is it that your attorney wishes you to do then? A. Well, I myself, would like to get the waiver and review it with him, being he's the attorney and he is more apt on legal matters than I.

Q. Then, I take it, this morning you are not prepared to sign a waiver of immunity? A. No, sir.

Q. And this morning you are refusing to sign a waiver of immunity? A. Well, if my lawyer showed, I'd—and had time to review, I'd have to sign it.

Q. I see. Then we will ask to have this piece of paper, titled, People of the State of New York against John Doe

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et al., waiver of immunity, currently in blank, marked as Grand Jury Exhibit 1.

(Marked Grand Jury Exhibit 1, in evidence.)

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By Mr. Andreoli:

Q. You have seen this document before, have you not? A. In this office I have.

Mr. Andreoli: In view of the witness' statement that he's not able to sign the waiver of immunity today, he is requesting time, I will request this grand jury to direct this witness to appear before this grand jury at 10:30 tomorrow morning.

I will, also, ask the foreman to direct the witness to take the document he now has in his hand, marked

Grand Jury Exhibit Number 1, with him and to return with that document tomorrow morning.

The Witness: May I make a statement, Mr. Andreoli?

By Mr. Andreoli:

Q. I am requesting the foreman to direct you to appear here tomorrow morning; do you understand that, Mr. Gardner? A. Yes, sir.

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The Foreman: The District Attorney wants you—

The Witness: I, respectfully, request an additional day. I have the Police Department charges against me and I have to appear in the Police Department trial room tomorrow.

Mr. Andreoli: What time?

The Witness: 12:30.

Mr. Andreoli: The request is for you to appear at 10:30, Mr. Gardner.

I am requesting that he be directed to appear 10:30 tomorrow morning, Mr. Foreman.

The Foreman: Do you understand that, Mr. Gardner?

The Witness: I am just requesting an additional day so I could clear up the Police Department matter.

The Foreman: The District Attorney would like to have you here at 10:30, would like to have you here at that time.

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The Witness: I'd like to be, but I'm fighting for my job in the Police Department at the trial room.

Mr. Andreoli: Mr. Gardner, this proceeding is entirely separate. Any proceeding which may or may not take place in the Police Department may be protracted.

The question to be resolved is whether or not this witness is prepared to sign a waiver of immunity and appear before this grand jury and, therefore, I have requested that he be directed to appear here at 10:30 tomorrow morning with his attorney and with the Exhibit 1.

The Foreman: Mr. Gardner, do you understand that you are to appear here tomorrow morning at 10:30?

The Witness: I still submit my request for an additional day. I don't think one day is going to make one difference.

Mr. Andreoli: Have your attorney appear with

you.

The Witness: He is scheduled to appear with me in the trial room, too.

Mr. Andreoli: 10:30 have your attorney appear here, you can make any applications you have at that time.

All right, will you step out, Mr. Gardner.

(Witness excused).

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PEOPLE vs. JOHN DOE, *et al.*, August 6, 1965

Before:

A QUORUM OF THE SECOND AUGUST 1965 GRAND JURY

Presented by: PETER ANDREOLI, Esq., PETER KOSTE, Esq.
Assistant District Attorneys

RAYMOND LINKLETTER, Grand Jury Reporter

* * * * * * *

—31—

ROBERT VINCENT GARDNER, Patrolman, Police Department of the City of New York, recalled as a witness, but was not sworn, further testified as follows:

By Mr. Andreoli:

Q. What is your name, shield and assignment? A. Robert Vincent Gardner, Shield 18984.

Q. And your rank? A. Patrolman of the 5th.

Q. You are here again pursuant to the direction of this Grand Jury, is that correct? A. Correct.

Q. You were here yesterday, is that correct? A. Yes, sir.

Q. At that time you requested an adjournment? A. Yes, sir.

Q. Is that correct? A. Yes.

Q. Your attorney is present with you today? A. Yes, sir, he's outside.

Q. What is his name and address? A. Ronald Padowski, 15 Park Row.

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Q. Is this the same attorney who was representing you since sometime in July of 1964? A. Yes.

Q. Now, yesterday you were informed, as you have been informed on prior occasions, that this Grand Jury was inquiring and seeking to determine whether or not a conspiracy existed in New York County to commit the crimes of bribery of public officers, namely police officers and more specifically to determine whether or not bribery monies had been paid by various gamblers to various members of the police department in order to secure police protection from arrests and suppression of this illegal gambling, is this correct? A. Yes, I understand your explanation.

Q. You understand the nature of the inquiry? A. Yes.

Q. You discussed that with your attorney? A. Yes.

Q. You understand further that under the Constitution of the United States, as well as the Constitution of New York, no one can be compelled to testify against himself, and that he has a right, the absolute right to refuse to

answer any questions that would tend to incriminate him.

Do you understand that? A. Yes.

Q. And have you discussed that with your attorney? A. Yes.

Q. You understand then, that under the Constitution of New York, as well as the Charter of the City of New York, that a public officer, which includes a police officer, when called before a Grand Jury to answer questions concerning the conduct of his public office and the performance of his duties is required to sign a waiver of immunity if he wishes to retain that public office? A. Yes.

Q. Have you discussed that with your attorney? A. Yes.

Q. And under that, are there any questions of law that concern that matter that you have not discussed with your

attorney at this time concerning which you have been apprised of? A. Until now? On the advise of my attorney

—34—

I have been regarded as a target of this investigation, and you have no authority to question me.

Q. Mr. Gardner, as you have already been told, you have been called here as a public officer, a police officer, to testify concerning the performance of your duties as a police officer, and the conduct of those duties by you.

Do you understand that that is the basis upon which you are being examined? A. Yes, in reference to the Police Department.

Q. All right. Now, therefore, you are now being requested to appear before this Grand Jury as a police officer, and to answer questions concerning this inquiry under a waiver of immunity. A. Not at this time.

Q. The question is, do you intend to sign a waiver of immunity, sir. A. Do you want me to sign this document now?

Q. Yes. You are being asked to testify now, sir. A. I will not sign this document at this time, since it would be inappropriate under the circumstances.

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Q. Make any statement that you wish concerning your refusal, and I take it that you are refusing to sign Grand Jury Exhibit I, which is a waiver of immunity? A. Not at this time, for the reasons stated.

Q. Will you state your reasons? A. I will not sign this document at this time because it would be inappropriate under the circumstances.

Q. That is a statement which you are reading from? A. Yes, sir.

Q. Was that statement prepared by your attorney, Mr. Padowski? A. Yes.

Q. And I will ask you again, are you prepared now at this time to sign this waiver of immunity and testify concerning your conduct in the performance of your duties as a police officer? A. Not at this time for the reasons stated.

Q. Are you refusing to sign a waiver of immunity? A. At this time, yes.

Mr. Andreoli: Will you step outside.

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(Witness excused.)

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Schedule "C"

(Police Dep't Letterhead)

To: Suspended Patrolman Robert V. Gardner
Shield #18984, 5th Precinct

August 6, 1965

The District Attorney of New York County has advised the Police Commissioner that you were called and appeared before the Grand Jury of New York County on the 6th day of August, 1965, and that you refused to waive immunity from prosecution as provided in Section 1123 of the New York City Charter and Article I, Section 6 of the Constitution of the State of New York.

You are, therefore, directed to appear before a Trial Commissioner in the Board Room on the second floor of Police Headquarters, 240 Centre Street, New York, New York, on the 10th day of August, 1965, at 2:30 P.M., to show cause why your employment as a member of the

Police Department should not be terminated and your office vacated as prescribed by the aforesaid provisions of law.

By direction of the Police Commissioner.

/s/ JOHN F. WALSH
John F. Walsh
First Deputy Commissioner

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Schedule "D"

IN THE MATTER OF A HEARING HELD BEFORE HON. LEONARD E. REISMAN, DEPUTY POLICE COMMISSIONER, at Police Headquarters, Borough of Manhattan, on Tuesday, August 10, 1965, to determine whether or not the employment of suspended Patrolman Robert V. Gardner should not be terminated and his office vacated, upon his refusal to waive immunity from prosecution, as provided in Section 1123, of the New York City Charter, and Article 1, Section 6, of the Constitution of the State of New York.

APPEARANCES—

For the Department:

Joseph F. X. Lynch, Esq.
240 Centre Street
New York, N.Y.

For suspended Ptl. Robt. V. Gardner:

Ronald Podolsky, Esq.
15 Park Row
New York, N.Y.

Dep. Com. Reisman: May I see the letter, please?

(Letter dated August 6, 1965 from Peter D. Andreoli, Assistant District Attorney, to Hon. Vincent J. Broderick, Police Commissioner, is handed to Deputy Commissioner Reisman).

Dep. Com. Reisman: We have the appearance noted?

Mr. Podolsky: Ronald Podolsky, 15 Park Row, Manhattan.

Dep. Com. Reisman: All right. This is a hearing convened as a result of a letter dated August 6, 1965

from Peter D. Andreoli, Assistant District Attorney, New York County, advising the Police Commissioner that Patrolman Robert V. Gardner, 5th Precinct, upon appearing before the Second August 1965 Grand Jury of the County of New York, refused to sign a Limited Waiver of Immunity, as required under the Constitution of the State of New York and the Charter of the City of New York. This hearing is to determine whether or not the employment of Patrolman Gardner should be terminated and his office vacated. All right. Proceed.

Mr. Lynch: Pursuant to this hearing, Commismissioner, this hearing was scheduled and a notice was served on the Respondent Patrolman Gardner. I would like to offer a copy of that notice. Counselor, any objection?

Mr. Podolsky: I have no objection, but I have a motion pertaining to that notice—I ask it be vacated as violative of the Rules and Procedures, Chapter 21. I feel that any act that is alleged to

be one of misconduct should proceed under the Rules and Procedures of the Department and that this particular proceeding is outside those rules and

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there is no jurisdiction to proceed in this matter. In addition I would like to call your attention to the fact that there are several other charges outstanding which have been held in abeyance pending the outcome of this. I object to this procedure and request that all three charges, including this one, be tried at once as one action. If this procedure is not followed then the danger of proceeding on this one charge will give rise to the situation where if he is restored by court order in the future we will have two additional charges to face, which charges we are now prepared to defend and in the interim witnesses or evidence may become lost which are now available. I request this be treated as any other charge in the Police Department regulations and U.F. 160 be served in accordance with Rules and Procedures and that this be treated as any other charge without any deviation from the Rules and Procedures as set forth, and I ask this notice be

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vacated, particularly since it is an order to show cause and I do not see or have not been made aware in any reading of the Rules and Procedures for authority in this matter and prejudice would result thereby.

Dep. Com. Reisman: Counselor, this notice is simply just that—it is a notice to your client that under the cases in the Supreme Court of the United States and under the Charter of the City and Con-

stitution of the State, this hearing is authorized to inquire into the very narrow issue of whether or not your client, Patrolman Gardner, did or did not refuse to sign a Limited Waiver of Immunity as provided by law. The fact there are other charges pending has no significance insofar as this limited hearing is concerned. Accordingly your motion is denied and we will proceed. Incidentally, if you do not wish to respond, you need not, but is there any issue apart from the motion you made addressed to the broad concept of the hearing—is there any issue as to the fact or whether your client did or did not refuse to sign a Limited Waiver of Immunity?

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Mr. Podolsky: I feel that is an issue. Yes, sir.

Dep. Com. Reisman: Then we will mark in evidence as Department's Exhibit #1 the letter I referred to at the opening—letter dated August 6, 1965 from Mr. Andreoli. And we will mark in evidence as Department's Exhibit #2 a copy of the notice served on the Respondent, Patrolman Gardner, dated August 6, 1965.

Mr. Podolsky: I object to all entries of evidence.

Dep. Com. Reisman: All right.

(Letter dated Aug. 6, 1965 from Peter D. Andreoli, Asst. Dist. Atty. to the Hon. Vincent L. Broderick, Police Commissioner, is marked Dept.'s Exhibit #1—8-10-65. S.O.).

(A copy of the notice served on Ptl. Gardner dated Aug. 6, 1965 is marked Dept.'s Exhibit #2—8-10-65. S.O.).

Mr. Lynch: The Department calls Mr. Peter D. Andreoli, Assistant District Attorney, New York County.

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PETER D. ANDREOLI, Assistant District Attorney, New York County, 155 Leonard St., N.Y., having been duly sworn, testified as follows:

By Mr. Lynch:

Q. Mr. Andreoli, how long have you been an Assistant District Attorney? A. About seventeen-eighteen years.

Q. What is your present assignment?

Mr. Podolsky: A little louder.

A. I am assigned to the Rackets Bureau of the District Attorney's Office.

Q. And on August 5th and 6th of this year did you appear before the Grand Jury from New York County, specifically the Second August 1965 Grand Jury? A. Yes.

Q. What was the nature of that appearance? A. It was a proceeding entitled John Doe *et al.*, being presented before that Grand Jury.

Q. And was the Respondent Patrolman Gardner called to that hearing? A. Yes.

Q. Was he present on August 5th, 1965? A. Yes.

Q. And did he make—was he placed under oath, by the way, Mr. Andreoli? A. He was not.

Q. Did he make a statement to that Grand Jury? A. He

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did.

Q. Was he tendered a Waiver of Immunity? A. On August 5th he was.

Q. What was—what were his instructions in connection with the Waiver of Immunity? A. After having been advised of his constitutional rights under the City Charter and State Constitution with reference to his position as a police officer and after having been instructed that the Grand Jury wished to question him concerning the conduct of his office in the performance of his duties, he was asked to sign a Waiver of Immunity which was marked Grand Jury Exhibit #1 at that time. He requested an adjournment and requested permission to take Exhibit #1 with him to show it to his attorney. He was granted that permission and directed by the Grand Jury to appear 10:30 the following day.

Q. Did he appear on the following day, Mr. Andreoli? A. He did.

Q. Did he make any further statement to that Grand Jury? A. He was again advised of his rights and the nature of the proceeding, which was an inquiry into—by the Grand Jury to determine whether or not the crimes of

conspiracy to bribe public officers—the bribery of public officers was committed. I believe it was explained more specifically before the Grand Jury to him that the inquiry was to find out whether or not bribes had been paid by gamblers to police officers for the purpose of permitting gambling to continue unlawfully and to aid in the continuance of that unlawful gambling. He was then asked if he was prepared to sign the Waiver of Immunity, Grand Jury Exhibit #1, and he said it was inappropriate at that time—he was refusing to sign it. I believe he indicated—his attorney told him he was a target of an investigation. The minutes have the exact language.

Q. Mr. Andreoli, I show you a stenographic transcript of the hearing on August 4 and August 5. Have you read that, sir? A. (Examining) Yes.

Q. Do they substantially reflect what questions were put by you and statements made by the Respondent, Patrolman Gardner? A. They do.

Mr. Lynch: I would like to offer them as Department's Exhibit #3.

Mr. Podolsky: Since I am objecting to the entire proceeding, I am objecting to the introduction of the documents.

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Dep. Com. Reisman: Mark them collectively, August 5 and August 6, as Department's Exhibit #3.

(Grand Jury transcript previously referred to is marked Dept.'s Exhibit #3—8-10-65. S.O.).

Q. Mr. Andreoli, at the hearing of August 6 before the Grand Jury, did the Respondent make any statement in connection with his signing a Waiver of Immunity that you had given him on August 5? A. He said he would not sign it on advice of counsel—that it was inappropriate and he was the target of an investigation; and he in fact did not sign Grand Jury Exhibit #1, which is the Waiver of Immunity, and he did not testify.

Q. I show you a piece of paper that is headed; "Waiver of Immunity", is that the Waiver of Immunity he was asked to sign? A. That is Grand Jury Exhibit #1.

Mr. Lynch: I would like to offer a Xerox copy of the Waiver of Immunity as Department's Exhibit #4.

Dep. Com. Reisman: The same objection?

Mr. Podolsky: Same objection, yes, sir.

Dep. Com. Reisman: Mark it as Dept.'s Exhibit #4.

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(Waiver of Immunity previously marked Grand Jury Exhibit #1 is marked Dept.'s Exhibit #4—8-10-65—S.O.).

Q. Mr. Andreoli, did you have any further conversations with the Respondent or his Counsel that would be—that contained any substance that would be of some information to this hearing? A. No, sir.

Mr. Lynch: I have no other questions of Mr. Andreoli.

By Mr. Podolsky:

Q. Now, sir, Mr. Gardner appeared pursuant to a subpoena, is that correct? A. That is correct.

Q. Now, is Mr. Gardner or is he not a target of the investigation of that particular Grand Jury? A. The word "target" is a meaningless word as far as—

Q. Is—

Dep. Com. Reisman: Just a minute. Let him finish his answer.

A. If the counsel means to inquire whether or not he was a possible defendant, the answer is yes, depending on what the evidence, before the evidence—before the Grand Jury happened to be.

Q. In other words he is under investigation by the Grand

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Jury as a potential defendant, is that correct? A. He is potentially a defendant.

Q. And he was asked to sign this document, Department's Exhibit #4, is it?

Dep. Com. Reisman: Yes.

Q. Exhibit #4, and then and there proceed to testify, is that correct? A. I don't understand your question. He was asked that question in June of 1964. He was asked that question on August 5 of 1965 and he was also asked that same question on August 6, 1965.

By Dep. Com. Reisman:

Q. Mr. Andreoli, was it your intention if the Respondent signed a Limited Waiver of Immunity to question him? A. Yes, sir.

By Mr. Podolsky:

Q. And you requested him to sign it and then and there testify? A. He would then be sworn—then he would be asked questions, yes.

Q. Immediately? A. Immediately.

Mr. Podolsky: Excuse me (Speaking to the Respondent).

Mr. Podolsky: No further questions.

Mr. Lynch: That concludes the Department's

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presentation.

Dep. Com. Reisman: Anything further?

Mr. Podolsky: A motion at this time that the Department has rested. The evidence—

Mr. Lynch: May I interrupt counsel for the record—may I, if you please, Counselor? The Grand Jury minutes that have been offered as Dept.'s Exhibit #3 were obtained pursuant to a court order which has been examined by counsel.

Dep. Com. Reisman: Why don't you make it Dept.'s Exhibit #5, the court order and affidavit to keep the record intact.

(Court Order and Affidavit previously referred to is marked Dept.'s Exhibit #5—8-10-65—S.O.).

Dep. Com. Reisman: Your motion, Mr. Podolsky.

Mr. Podolsky: At this time the Respondent moves to dismiss not only on the basis of my prior motion this hearing is apart from the Rules and Procedures, but also from a substantive point of view because it has been clearly demonstrated that Mr. Gardner was a target of the investigation and that there is

no authority on the part of the Grand Jury to subpoena and examine a target of investigation. I will cite as my authority People against Steuding & Ryan, 6 N.Y. 2nd 214.

Dep. Com. Reisman: And People against De Feo—308.

Mr. Podolsky: The De Feo case is also in point somewhat but Steuding is directly on point. Mr. Gardner's presence in that room at that time was illegal and anything that transpired in that room at that time was illegal and not binding on Mr. Gardner, and also the request for the signing, rather the execution as called for by statute was not in proper

form and I request the case be dismissed on the merits.

Dep. Com. Reisman: Decision is reserved. That's all.

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Schedule "E"

(Police Department Letterhead)

August 11, 1965

Report and Recommendations to the Police Commissioner in the Matter of:

Suspended Patrolman Robert V. Gardner, Shield 18984, 5th Precinct.

After hearing held before the undersigned on August 10, 1965, minutes attached hereto, the following findings were made:

Suspended Patrolman Robert V. Gardner, Shield 18984, was called and appeared before a Grand Jury of New York County on August 6, 1965, the said Grand Jury there and then conducting an investigation to determine whether or not the crime of conspiracy to bribe a public officer had been committed, the said suspended Patrolman Robert V. Gardner refused to waive immunity from prosecution as required by Section 1123 of the New York City Charter.

It is therefore recommended that the employment of the said suspended Patrolman Robert V. Gardner be terminated and his office vacated effective as of August 6, 1965.

/s/ Leonard E. Reisman
Leonard E. Reisman
Deputy Commissioner
Legal Matters

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Schedule "F"

(Police Department Letterhead)

Suspended Patrolman Robert V. Gardner, Shield #18984, 5th Precinct, having appeared before the Grand Jury of New York County on the 6th day of August, 1965, and having refused to waive immunity from prosecution as required by Section 1123 of the New York City Charter, and a hearing having been held in connection therewith, his employment in the Police Department of the City of New York is terminated and his office vacated effective August 6, 1965.

/s/ VINCENT L. BRODERICK
Vincent L. Broderick
Police Commissioner

Dated: August 11, 1965

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Schedule "G"

(Police Department Letterhead)

August 11, 1965

Mr. Robert V. Gardner
84-10 Penelope Avenue
Rego Park, New York

Dear Sir:

I have been directed by the Police Commissioner, Vincent L. Broderick, to advise you that you having appeared

before the Grand Jury of New York County on the 6th day of August, 1965, and having refused to waive immunity from prosecution as required by Section 1123 of the New York City Charter, and a hearing having been held in connection therewith, your employment in the Police Department of the City of New York is terminated and your office vacated effective August 6, 1965.

Very truly yours,

LOUIS L. STUTMAN
CHIEF CLERK

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Schedule "H"

AMENDMENTS TO THE RULES AND PROCEDURES

• • • • • • •

New Paragraph 2/36.6 is added to read:

2/36.6 The following are applicable to members of the force:

Article 1, Section 6 of the New York State Constitution provides in part:

• • • • • • •

(text omitted as it is identical with paragraph "4" of the Answer & Return)

• • • • • • •

Section 1123 of the Charter of the City of New York provides:

• • • • • • •

(Text omitted as it is identical with paragraph "5" of the Answer & Return)

Reply

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Petitioner as and for his reply alleges:

First: Denies the allegations of paragraphs 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18 and 19 of the answer & Return.

Second: Petitioner was not convicted of any act of misconduct or incompetence as a prerequisite to his dismissal, as the alleged requirements of office or acts of misconduct or incompetence as set forth in paragraphs 4 & 5 of the answer, and the alleged charge as set forth in Exhibit (Schedule) C of the return are contrary to the Constitution of the United States and of no force and effect.

Third: Respondents did not afford a proper hearing of the alleged charges and of pre-existing charges in that procedures required by the Departmental Rules & Procedures were not followed.

WHEREFORE Petitioner demands judgment requested in the Petition together with such further relief as to the Court may seem just and proper.

Dated: New York, New York,
October 18, 1966.

(Endorsements omitted)

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Order

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 9th day of February, 1967.

Present:

HON. BERNARD BOTEIN,
Presiding Justice,

" GEORGE TILZER,
" BENJAMIN J. RABIN,
" G. ROBERT WITMER,
Justices.

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[SAME TITLE]

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent Police Commissioner, dated August 11, 1965, dismissing petitioner from the position of Patrolman in the Police Department of the City of New York, after a hearing upon charges of misconduct, and for other relief;

And this proceeding having been transferred by order of said court, entered on the 26th day of October, 1966, to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Mr. Ronald Podolsky, of counsel for the petitioner, and by Mr. Robert

T. Hartmann, of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondents be and the same hereby is confirmed and the petition dismissed with $50 costs and disbursements to the respondents.

ENTER:

HYMAN W. GAMSO
Clerk

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Judgment

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

The above named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent, Police Commissioner, dated August 11, 1965, dismissing petitioner from the position of Patrolman in the Police Department of the City of New York, after a hearing upon charges of misconduct, and for other relief;

And this proceeding having been transferred by order of said court, entered on the 26th day of October, 1966, to the Appellate Division of the Supreme Court, First Department, and that Court, in an order entered in the office of the Clerk of said Appellate Division, on the 9th day of

February, 1967, having ordered that the determination of the respondent be confirmed and the petition dismissed with $50—, costs and disbursements to the respondents, and the costs of the respondents having been duly taxed at the sum of $318.34,

Now on motion of J. Lee Rankin, Corporation Counsel, attorney for the respondents, it is

ADJUDGED that the petition be and the same hereby is dismissed, and it is further

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ADJUDGED that the respondents, Vincent L. Broderick as Police Commissioner of the City of New York, and The City of New York, (Municipal Building, New York, 10007, N. Y.) recover of the petitioner Robert Vincent Gardner (84-10 Penelope Avenue, Rego Park, N. Y.) the sum of $318.34 costs as taxed and that said respondents have execution therefor.

Dated: March 2, 1967.

JAMES MCGURRIN
Clerk

Notice of Appeal to the Court of Appeals, State of New York

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that the above-named Petitioner, relying solely upon the question involving the validity of Article I, Section Six of the New York State Constitution as pertains to the United States Constitution, Amendments I, V and XIV, hereby appeals as of right to the Court of Appeals of the State of New York, from the order of the Appellate Division of the Supreme Court of the State of New York, First Department dated February 9, 1967 and entered in the Office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, First Department ordering that the determination of the respondent be confirmed and the petition be dismissed with $50.00 costs and disbursements to the respondents without opinion, and from each and every part of said order and the whole thereof.

Dated: New York, N. Y., February 23, 1967.

(Endorsement omitted)

Opinion by Fuld, *Ch.J.*

STATE OF NEW YORK
COURT OF APPEALS

1. No. 181. ——67

In the Matter of the Application of

ROBERT VINCENT GARDNER,

Appellant,

For an Order &c.

vs.

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, & ano.,

Respondents.

FULD, *Ch.J.*:

In this article 78 proceeding, the petitioner seeks reinstatement as a patrolman in the New York City Police Department, claiming that he was dismissed solely for refusing to waive his privilege against self-incrimination and that it was unconstitutional for the Police Commissioner to discharge him on that ground. In August of 1965, a New York County Grand Jury was investigating accusations of bribery and corruption of police officers in connection with illicit gambling operations. The petitioner, then under departmental charges, was subpoenaed to appear before the grand jury. After being advised of the investigation and that the grand jury desired to question

him concerning the performance of his official duties, he was requested to sign a limited waiver of immunity—"to waive immunity from prosecution" for any misconduct in office disclosed by his testimony—as provided in section 1123 of the New York City Charter. (See, also, N.Y. Const., art. I, §6.)[1] The petitioner was also informed that, under

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both the Charter and the Constitution, he was required to sign the waiver and that, if he refused to do so, he would be discharged from his position as a police officer. He refused to execute the waiver and, following an administrative hearing, was dismissed from the force.

It is clear, and was so understood by the petitioner, that section 1123 of the Charter required him, as a condition of his continued employment by the police department, to waive his constitutional privilege against self-incrimination and to answer questions regarding the conduct of his office

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[1] Section 1123 of the City Charter provides, in part, that, if any employee of the City "shall * * * wilfully refuse or fail to appear before * * * any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding * * * official conduct of any officer or employee of the city or of any * * * county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant."

And section 6 of article I of the State Constitution declares, insofar as relevant, that "No person shall * * * be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his * * * office * * * or the performance of his official duties * * *, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, * * * be removed from his * * * office by the appropriate authority."

and the performance of his official duties. Such provisions have been upheld in the past (see, e.g., *Nelson* v. *Los Angeles County,* 362 U.S. 1) and, although the Supreme Court has indicated that the question may still be an open one (see *Spevack* v. *Klein,* 385 U.S. 511, 516, n. 3; *Stevens* v. *Marks,* 383 U.S. 234, 243), we find no constitutional defect in the statute as it applies to this petitioner.

In *Garrity* v. *New Jersey* (385 U.S. 493), the Supreme Court, deciding that the government may not use "the threat of discharge to secure incriminating evidence" against a public employee, held that a police officer could not be compelled to waive his constitutional privilege against self-incrimination by threats that he would otherwise be removed from office. The testimony obtained under

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such circumstances was ruled to be inadmissible in subsequent criminal proceedings brought against him. This decision undoubtedly had the effect of partially invalidating section 1123 of the New York City Charter as well as section 6 of article I of the New York Constitution. But nothing decided in the *Garrity* case bears on the issue in the present case. If the petitioner before us had executed the waiver required by section 1123 and then testified about misconduct in office, his testimony, though inadmissible in a criminal prosecution, would, nevertheless, have furnished sufficient cause to justify his dismissal from the police force. (Cf. *Ullman* v. *United States,* 350 U.S. 422, 430-431.)

In point of fact, the petitioner did not execute the waiver and stood on his constitutional privilege against self-incrimination when notified that he was to be questioned about malfeasance as a police officer. Such information

patently bore upon his fitness to remain in office, information which the public had a right to know and the petitioner was under a duty to reveal. His refusal to speak on the subject constituted "employee insubordination for failure to give information which * * * the State has a legitimate interest in securing". (*Nelson* v. *Los Angeles County*, 362 U.S. 1, 7, *supra*; see *Spevack* v. *Klein*, 385 U.S. 511, 519, *supra* [*per* Fortas, J., concurring]), and, consequently, he was properly dismissed from the police force. (See *Canteline* v. *McClellan*, 282 N.Y. 166; *Christal* v. *Police Com. of San Francisco*, 33 Cal. App. 2d 564; *Cunningham* v. *Civil Service Com'n*, 48 Hawaii 278; *Fallon* v. *New Orleans Police Department*, 238 La. 531; *Souder* v. *Philadelphia*, 305 Pa. 1.) Although people in public office and on the public payroll may not be compelled to surrender their constitutional privilege against self-incrimination (see *Garrity* v. *New Jersey*, 385 U.S. 493, *supra*), they have no constitu-

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tional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties.

In *Spevack* v. *Klein* (385 U.S. 511, *supra*), the Supreme Court held that an attorney could not be compelled, upon pain of disbarment, to waive his privilege against self-incrimination and testify about his professional conduct. (See, also, *Matter of Cohen*, 7 N Y 2d 488, 498 [dissenting opinion].) However, a lawyer, though licensed by the State —like a doctor, barber or chauffeur—is not, as Mr. Justice Fortas pointed out in his concurring opinion in the *Spevack* case (385 U.S., at p. 520), "an employee of the State. He does not have the responsibility of an employee to account to the State for his actions." The petitioner, however, did

have such a responsibility and his refusal to carry out that responsibility rendered him subject to removal from his position of public trust and confidence.

The order appealed from should be affirmed, without costs.

* * * * * * *

Order affirmed, without costs. Opinion by Fuld, Ch. J. All concur.

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Remittitur

No. 181

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1967.

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1. No. 181. 67

In the Matter of the Application of

ROBERT VINCENT GARDNER,

Appellant,

For an Order &c.

—VS.—

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, & ano.,

Respondents.

BE IT REMEMBERED, That on the 15th day of April in the year of our Lord one thousand nine hundred and sixty-seven, Robert Vincent Gardner, the appellant in this cause, came here unto the Court of Appeals, by Ronald Podolsky, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Vincent L. Broderick, as Police Commissioner of the City of New York, & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

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WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And it was also

further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

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THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

(Certification omitted in printing)

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Charges and Specifications

THE CITY OF NEW YORK
POLICE DEPARTMENT

Date August 4, 1965

Command—P.C.C.I.U.
Serial No.—43
Disciplinary Records Unit Serial Number—37604

To the Police Commissioner:

I hereby CHARGE Ptl. Gardner, Robert V. 18984 5th
Rank-Title Surname First Name Initial Shield No.
Precinct with VIOLATION OF THE RULES AND PROCEDURES in
Command Squad or Chart No.
that:

SPECIFICATIONS

1. Said Patrolman Gardner, while a member of the Police Force of the Police Department of the City of New York, and, commencing on or about February of the year 1962 and continuing to or about June 24, 1964, did, knowingly, wilfully, wrongfully, unlawfully and corruptly conspire, combine, confederate and agree with other members and former members of the Police Department of the City of New York, including: Lawrence Jessup, John J. Smith, John A. Murphy, Stephen G. Sauerbrey, all Patrolmen who were dismissed from this Department on June 25, 1964; Seymour Friedman, a former patrolman, who resigned January 6, 1959; Walter Z. Teleky, retired patrolman January 31, 1956; and with various known gamblers, gamblers, their associates and employees, to aid, abet and assist said known gamblers, gamblers, their associates and employees

in unlawfully carrying on, in the City of New York, their gambling operations; and, in furtherance of said conspiracy, did, in fact, meet and consort with, at various locations within the City of New York, said known gamblers, gamblers, their associates and employees, including: Alfred Cupola, alias "Sharkey", B#54987, K.G.#2656; Ramon Marquez, alias "Spanish Raymond", B#420301, K.G. #3220; Gerald Mastriocovo, alias "Jerry", E#34519, K.G. #3802; William Taylor, alias "Kid Dexter", B#308434, K.G.#3219; Skeeter Lorenz, alias "Skeeter", B#354124, K.G.#1163; Clarence Hales, alias "Crappy", B#120757, K.G.#4013; Earl Benton, alias "Earl", B#14780, K.G. #3394; William Vasilou, alias "Bill the Greek", B#559153, K.G.#3154; Gus Baxter, alias "Gus", B#372003, K.G. #3023; Hyman Rapchinsky, alias "Rappy", B#194267; Michael Calabrese, #17587; Rocco Errichetti, E#21586. (R & P 1/1.0, 2/15.0, 2/37.1, 2/63.2, 8/1.0.)

2. Said Patrolman Gardner, while a member of the Police Force of the Police Department of the City of New York, as a part of said conspiracy and in furtherance thereof, together with other members of the Police Department of the City of New York, did wilfully, unlawfully, criminally and corruptly agree to refrain from the honest and faithful performance of his duty as a police officer with respect to the enforcement of the laws of the State of New York regarding gambling, and the said Patrolman Gardner did, in fact, so refrain from the honest and faithful performance of his aforesaid duty.
(R & P 1/1.0, 2/15.0, 2/37.1, 2/63.2, 8/1.0.)

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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In the Matter of the Application of

ROBERT VINCENT GARDNER,

Petitioner-Appellant,

For an Order Pursuant to Article 78, CPLR,

—against—

VINCENT BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Respondents-Respondents.

I. Notice is hereby given that Robert Vincent Gardner, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment and order of the Court of Appeals of the State of New York, which did Order and Adjudge that the Order of the Appellate Division of the Supreme Court of the State of New York, First Department, be affirmed, and which Order of the Supreme Court of the State of New York, Appellate Division First Department, did confirm the determination

of the Respondents above named, which determination did dismiss the Appellant from his position as Patrolman, New York City Police Department. The said Order of the Court of Appeals was made and entered at the Court of Appeals on July 7, 1967, and the remittitur entered and filed in the office of the Clerk of the County of New York on July 14, 1967 with notice of entry served on counsel for Appellant on July 17, 1967.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2) from the Order of the Court of Appeals of the State of New York where was drawn in question the validity of Article I Section 6 of the New York State Constitution and Section 1123 of the New York City Charter on the ground that they were repugnant to the Constitution of the United States and the decision was in favor of their validity.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

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Supreme Court of the United States, and include in said transcript the following:

1. The Notice of Petition and Petition.
2. The Answer & Return.
3. The Reply.
4. The Order of the Appellate Division First Department, February 9, 1967.
5. The Judgment dated March 2, 1967.
6. The Notice of Appeal to the Court of Appeals.
7. The Opinion of FULD, J. in the Court of Appeals.